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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CATHY JEAN JOHNSON and
THOMAS RAY BOATZ JOHNSON and
REBECCA JOYCE JOHNSON,
by their next friend,
CATHY JEAN JOHNSON,
Respondents,

vs.

PACIFIC INTERMOUNTAIN EXPRESS COMPANY,
Petitioner.

On Writ Of Certiorari To The Supreme Court Of Missouri

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTION PRESENTED FOR REVIEW

The Supreme Court of Missouri, by a 4 to 3 decision, has interpreted the Interstate Commerce Commission regulation governing truck leasing, 49 C.F.R. Section 1057.4 (1978), as imposing tort liability upon petitioner, a regulated motor carrier, for the negligent acts of a driver of a leased truck after expiration of the lease, solely by virtue of the continued presence on the truck of petitioner's identifying placard at the time of an accident. The court imposed vicarious liability despite the undisputed fact that the driver was no longer serving petitioner's business interests nor hauling freight for petitioner, but was on a mission for another shipper. Does such an interpretation of the regulation deny to petitioner its right to be treated as if it were an owner of the leased truck under the provisions of the governing federal statute, the Motor Carrier Act (49 U.S.C. Section 11107(a)(4)(Supp. 1983)), in that petitioner as an owner of the truck could be held liable for the negligent acts of a driver only if the driver were acting within the scope and course of his employment for petitioner? Does such an interpretation of the regulation draw into question the Constitutional validity of the federal regulation due to this conflict with the governing statute, or deny to petitioner the immunity from tort liability for the unauthorized acts of a driver of leased equipment granted to petitioner by the Motor Carrier Act?

STATEMENT OF INTERESTED PARTIES

Petitioner herein was a defendant-appellant and respondents were plaintiffs-respondents in the Supreme Court of Missouri. In addition, Marlo Transport Corporation was an additional defendant-appellant in the Supreme Court of Missouri. On January 10, 1984, Marlo Transport corporation partially satisfied the judgment rendered in favor of respondents below, and petitioner has filed a Statement of Non-Interest of Party as to Marlo Transport Corporation with the Clerk of this Court in accordance with Supreme Court Rule 19.6.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

REFERENCE TO OFFICIAL REPORT OF OPINION BELOW

The Opinion of the Supreme Court of Missouri in *Johnson v. Pacific Intermountain Express Company* is reported at 662 S.W.2d 237 (Mo. banc 1983) (4-3 decision), as modified on denial of rehearing, December 20, 1983.

JURISDICTIONAL STATEMENT

This Petition for Writ of Certiorari is brought to review the judgment and majority Opinion of the Supreme Court of Missouri, initially entered in this case on November 22, 1983. A timely Motion for Rehearing was filed by petitioner in the Supreme Court of Missouri on December 7, 1983, within fifteen days of the entry of the judgment as provided by Missouri Rule of Civil Procedure 84.17. The Supreme Court of Missouri entered its order overruling petitioner's Motion for Rehearing and filed its modified Opinion on December 20, 1983. This Petition for Writ of Certiorari is, therefore, timely filed within ninety days following the order overruling petitioner's Motion for Rehearing in the court below, pursuant to 28 U.S.C. Section 2101(c) (1976) and United States Supreme Court Rule 20.4. *Department of Banking of Nebraska v. Pink*, 317 U.S. 264 (1942).

Jurisdiction of this Court is based upon the provisions of 28 U.S.C. Section 1257(3) (1976). Petitioner contends that the judgment and Opinion of the Supreme Court of Missouri denies to petitioner its right to be treated as if it were an owner of a leased truck for purposes of civil tort liability, and abridges petitioner's immunity from civil tort liability for the unauthorized acts of a driver of a leased truck pursuant to the Motor Carrier Act (49 U.S.C. Section 11107(a)(Supp. 1983)). The judgment below, which creates an undeniable conflict between the provisions of the Interstate Commerce Commission regulation governing truck leasing, 49 C.F.R. Section 1057.4 (1978), and this section of the Motor Carrier Act also draws into question the validity of the federal regulation under Article I, section 1 of the United States Constitution.

The existence of these federal questions is established upon the face of the majority Opinion of the Supreme Court of Missouri filed December 20, 1983 (see Appendix A). In the courts below, petitioner contended that respondents' jury instruction number 7 failed to submit an essential element of

respondents' case under the state law of Missouri: That the driver who caused respondents' damage was acting within the scope and course of an employment for petitioner at the time of the accident. The Missouri Supreme Court's Opinion, relying on the federal regulation noted above, ruled that the scope of employment issue was not an element of respondents' case and was not required to be submitted to the jury. Citing the Interstate Commerce Commission (hereinafter referred to as I.C.C.) regulation on truck leasing, 49 C.F.R. Section 1057.4(d)(1) (1978), the Missouri Supreme Court held that the mere presence of petitioner's identifying placard on the truck at the time of the accident was sufficient to impose vicarious liability upon petitioner for the driver's negligence, even though the placard was allegedly furnished to the driver for a previous lease but was not retrieved by petitioner at the end of that lease. At page 19 of the majority Opinion, the Missouri Supreme Court stated that:

> The conclusion we reach is based upon statutory policy rather than a conventional respondeat superior theory. It is based on the failure to comply with an explicit provision of the governing regulations . . .
> (662 S.W.2d at 245).

In dissent, Judge Welliver noted the conflict between this holding and the governing federal statute, stating:

> The Court defends the judgment against P.I.E. on the basis of a contrived agency relationship imposed by the Court as a matter of policy, theoretically to promote the objectives of a federal regulatory scheme. We previously have interpreted the Interstate Commerce Commission (I.C.C.) regulations relied on this case as imposing no greater degree of liability "than the carrier's liability for the negligence of its driver when operating its own equipment." *Brannaker v. Transamerican Freight Lines, Inc.* 428, S.W.2d 524, 529 (Mo. 1968). It is apparent that, despite its claims to the contrary, the majority has rejected

> the teaching of *Brannaker* and in its stead, has embraced a view that the Court defined policy objectives underlying the regulatory scheme warrant imposing something resembling strict liability for trucking carriers.
> (662 S.W.2d at 247).

Thus, the Supreme Court of Missouri based its decision not upon an alternative ground of state law, but expressly upon an interpretation and construction of the federal statute and regulation.

This Court has repeatedly held that where a state court of last resort has based its judgment upon an interpretation of a federal statute, or a right claimed thereunder by petitioner, jurisdiction to entertain a Writ of Certiorari exists. *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958); *Wilko v. Swan*, 346 U.S. 427 (1953); *Honeyman v. Hanan*, 300 U.S. 14, 18 (1936). The Court has previously granted certiorari to consider this same I.C.C. regulation, in *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28 (1975). In *Brada Miller*, the Court examined the validity of an idemnification agreement entered into between two motor carriers, to determine if that agreement was an attempt to circumvent the regulatory requirement that a motor carrier have complete control and responsibility for leased trucks during the term of the lease. In *Illinois Steel Company v. Baltimore And Ohio Railroad Company*, 327 U.S. 508 (1944), this Court held that the provisions of a uniform bill of lading governing interstate shipments of goods which were prescribed by Congress and the I.C.C. had the force of federal law, and that questions as to the construction of these provisions determined by state courts were subject to review by the United States Supreme Court on certiorari. Under these decisions, it is clear that a federal question is involved here. Because the Supreme Court of Missouri based its judgment and opinion solely upon a ground involving federal law, this Court has jurisdiction of the Writ of Certiorari, even though the Supreme Court of Missouri might have rested its

decision upon an independent state law ground. *Zacchani v. Scripps-Howard Broadcasting Company,* 433 U.S. 562 (1977); *Henderson Bridge Company v. City of Henderson,* 173 U.S. 592 (1899).

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND FEDERAL REGULATIONS INVOLVED

This case involves the following Constitutional provision:

> U.S. CONST. art. I, section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

In addition, the case involves several federal statutes and regulations. Citations to these provisions are included herein with a general description of their content. The full text of the pertinent provisions are set forth in the appendix as noted.

> 28 U.S.C. Section 1257(3) (1976). This statute is relied upon by petitioner as the ground for this Court's jurisdiction over this Petitioner for Writ of Certiorari. (See Appendix E).
>
> 49 U.S.C. Section 10526(a)(6)(B) (Supp. 1983). This statute provides that transportation of agricultural commodities is exempt from the jurisdiction of the I.C.C. (See Appendix F).
>
> 49 U.S.C. Section 11107(a) (Supp. 1983). This statute authorizes the I.C.C. to regulate the leasing of trucks by authorized motor carriers subject to certain restrictions upon that regulatory power. (See Appendix G).
>
> 49 U.S.C. Section 11101(c)(2) (Supp. 1983). This statute provides that trucks leased by a motor carrier for a return trip after a haul of agricultural commodities are exempt from the provisions of the I.C.C. regulations governing the duration of leases. (See Appendix H).

49 C.F.R. Section 1057.4 (1978). This federal regulation governs the leasing of trucks by authorized motor carriers. (See Appendix I).

STATEMENT OF THE CASE

Factual Background

This action for damages arises out of the death of Thomas A. Johnson, who died when a tractor-trailer truck struck his automobile on November 19, 1978 on U.S. Highway 65 in Dallas County, Missouri. Respondents recovered a judgment for $750,000 against petitioner and Marlo Transport Corporation (hereinafter referred to as "Marlo") in the Circuit Court of Dallas County, Missouri (see Appendix C). There is no dispute about the negligence of the truck driver, Lee Brown, Jr.; the truck was on the wrong side of the road at the time of the accident. The issue is whether petitioner may be held vicariously liable for Brown's negligence solely because a tattered P.I.E. placard bearing petitioner's I.C.C. permit number was taped on the truck.

The truck was owned by Equilease Corporation and leased to Roland Tabor of St. Louis, Missouri, under a long-term lease. Tabor employed Lee Brown, Jr. and Bill Singleton of East St. Louis, Illinois, to drive the truck for him. According to Tabor, his drivers were paid a percentage of the monies received for hauling goods. Tabor did not have authority from the I.C.C. to carry regulated commodities in interstate commerce. He had leased another truck he owned to various motor carriers having I.C.C. authority, including Riss International, Kirby Transportation, and the All States Division of petitioner Pacific Intermountain Express Company (hereinafter referred to as P.I.E.).

The truck involved in this case was never leased to an authorized motor carrier on a long-term basis. Instead, Brown and Singleton would obtain loads of agricultural produce in California and haul them to east coast markets. Under the I.C.C. regulations, agricultural produce is an "exempt com-

modity" and no I.C.C. authority was required for these eastbound loads. Brown and Singleton would then solicit loads of regulated freight for their return trips to the west coast, and would generally enter into single "trip leases" with authorized motor carriers for these return loads, operating under the carrier's I.C.C. authority. Brown and Singleton had made seven or eight cross-country road trips with this truck before the collision on November 19, 1978.

Petitioner P.I.E. is a major motor truck carrier with its principal place of business in Walnut Creek, California. Petitioner has three separate divisions which operate under authority from the I.C.C. Two of P.I.E.'s divisions own trucks and perform specialized freight transportation services. The third division, All States Trucking Division, does not own trucks. It leases tractor-trailer trucks from independent owner-operators who haul regulated freight in their trucks pursuant to petitioner's I.C.C. authority. These leases are extensively regulated by the I.C.C., as will be discussed later.

Whenever petitioner leases a truck from an owner-operator, a written lease is prepared in triplicate. The original of the lease is filed and retained at petitioner's central headquarters. The I.C.C. regulations require that one copy of the lease is to be kept in the truck at all times during the term of the lease, and the third copy is retained by the owner of the truck. At the beginning of the lease, P.I.E. provides the truck driver with placards to be displayed on the truck bearing petitioner's I.C.C. permit number "MC730" to identify P.I.E. as the authorized carrier. For a "trip lease," separate placards are provided to the driver for each trip. After delivering the load to its destination pursuant to a trip lease agreement, the driver is obligated to return the placards to P.I.E. The driver may check in with the P.I.E. agent at his destination point, and after providing documentation of the delivery and returning the placards, a draft is forwarded to the truck owner by P.I.E. in payment of the lease charges, less any amounts which were advanced to the driver prior to the trip. The P.I.E. agent then forwards a com-

plete package of the trip lease documents, including the trip report and the placards issued to the driver, to P.I.E.'s central headquarters in Walnut Creek, California. P.I.E. maintains a file at its central headquarters for the documents associated with each trip lease, which contains the original copy of the lease agreement, the cancelled check number, the trip report and the placards. P.I.E.'s records revealed no evidence that P.I.E. had entered into a lease for the trip in question with Tabor, Singleton or Brown.

Petitioner's placards are marked with a serial number, which P.I.E. records when placards are issued to a driver. Petitioner's field agents are individually responsible for the placards issued to them and for logging the serial numbers as the placards are dispensed. The agents are instructed to treat the placards basically in the same manner as the issuance of a company check. The drivers of a leased truck are instructed to remove the placards and return them to P.I.E. with the other documentation for the trip when each trip is completed. P.I.E.'s policy is to fine its agents $50 if they do not account for placards issued for a given trip or provide an explanation for the destruction of the placards. The procedure of recording placard numbers and fining field agents for the failure to account for them without explanation was intended by P.I.E. to ensure that drivers do not use P.I.E.'s placards without its permission. However, drivers have on some occasions failed to return those placards, and have still obtained payment for their trip. The placards are valuable in that they aid drivers hauling "hot freight" without I.C.C. authority in crossing state boundaries and avoiding detection at weight scales. For these reasons, placards are often stolen and traded among truckers. P.I.E. had no record of ever having issued placards to Brown or Singleton.

The I.C.C. has promulgated detailed regulations governing the leasing of trucks by authorized motor carriers. At the time of this accident, I.C.C. Regulation 49 C.F.R. Section 1057.4 (1978) governed the terms and conditions of such leases, and is at the heart of this matter. This regulation provides, among

other requirements, that leases between truck owners and authorized motor carriers must be in writing and signed by both parties, must provide for a minimum lease duration of thirty days, and must provide for the "exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto. . ." by the authorized carrier for the duration of the lease. In addition, the regulations provide that the authorized carrier must provide the driver with a receipt and identifying placards at the time the driver takes possession of the truck, and that the authorized carrier must obtain a receipt from the driver and remove its identifying placards from the truck at the time possession is returned to the owner-operator (see text of the regulation in Appendix I).

The thirty-day minimum duration requirement of the regulations basically outlaws the "trip lease" for hauling regulated freight. However, Congress has enacted a specific exemption from the minimum durational requirement of the regulation which is applicable in this case. The "agricultural haulers exemption" (49 U.S.C. Section 10526(a)(6)(B)(Supp. 1983)) prohibits the I.C.C. from attempting to regulate the duration of any lease entered into by an owner-operator immediately following a haul of exempt agricultural commodities if the owner-operator is hauling a return load in the direction of his point of origin. In essence, the exemption allows an agricultural produce hauler to enter into a single "trip lease" for return trips to his home base. Brown and Singleton, after delivering loads of agricultural produce on the east coast, were free to enter into single "trip leases" with authorized carriers which were not controlled by the durational requirements of the I.C.C. regulation.

Petitioner was not involved in any long-term lease of this truck. Respondents' evidence of P.I.E.'s involvement came from the testimony of Bill Singleton, the co-driver of the truck at the time of the accident. Having no record of any leases with these drivers, P.I.E. was unable to refute his testimony. Singleton testified he had entered into three or four "trip leases" with P.I.E. in the two and one-half months prior to the

collision. He had last carried a load for P.I.E. under a trip lease ten or twelve days prior to the accident. However, all the evidence was that any trip leases made by P.I.E. terminated according to their terms upon delivery of the goods on the west coast. Any trip leases between Singleton and P.I.E. had, therefore, terminated before the accident, unless the continued presence of the P.I.E. placard operated to extend this single trip lease indefinitely under the regulation.

Singleton testified that the first time he hauled goods westward for P.I.E., he was hired by a field agent in New Jersey whom he recalled as "Ray Dean." Singleton was given a trip lease, permits for various states and P.I.E. placards to attach to the sides of his truck. He also received $600 to $700 in advance expense money. The placards he was given on his first trip for P.I.E. were different than the single placard which was on the truck at the time of the collision. Singleton was instructed to return these placards and all trip documents to P.I.E., either by mailing them to P.I.E.'s home office, or by retaining them until he returned to the east coast and delivering them to Ray Dean. Singleton personally returned the trip documents and placards to Dean at the end of his next produce haul to the east coast. Singleton testified that he could not remember whether he removed the P.I.E. placards as soon as he delivered the load on the west coast, or whether the placards remained on his truck until he returned to New Jersey. At any rate, he did not need the placards on his eastbound trip as he was hauling exempt agricultural commodities.

On the second occasion that Singleton and Brown hauled goods for P.I.E., Singleton testified they went to the P.I.E. office in New Jersey and were again given a trip lease, P.I.E. placards and some advance money. Singleton was again instructed to return the trip documents and placards when he returned to the east coast to receive his final payment. Singleton stated he did not remove one of the placards from his truck at the conclusion of this trip for P.I.E. When he returned to the east coast, he delivered the trip documents to Ray Dean and ob-

tained final payment for the second trip, but testified he did not return one of the placards. That placard remained on his truck until the accident.

Singleton knew that he was supposed to return the P.I.E. placard even though the P.I.E. field agent did not specifically ask for its return. Singleton and Brown made one or two more trips for P.I.E. after that second trip lease. They again dealt with Ray Dean. Singleton testified that they may have been given new placards for each of these trips, but that he did not use them because he already had one on his truck. He testified that the placard which was on the truck at the time of the accident was one of the P.I.E. placards which was given to him for his second trip lease for P.I.E. He also testified that he and Brown were never criticized by P.I.E. for failing to remove that placard.

Singleton also testified that the presence of the P.I.E. placard on the truck made him feel more secure in traveling the highways without being stopped by patrolmen while they were hauling "hot freight." In the trucking business, hauling regulated freight without I.C.C. authority or a lease from an I.C.C. authorized carrier is known as hauling "hot freight" or illegal freight. These drivers had no authority. Brown and Singleton intentionally left the P.I.E. placard on their truck for that reason. Singleton would have received a ticket if he had been stopped hauling "hot freight," since he would have been unable to show a lease from an authorized carrier despite the presence of the P.I.E. placard on the truck.

The trip during which the accident occurred had its origins at a truck stop in New Jersey. Brown and Singleton had just finished hauling produce from the west coast to the east coast. They needed no I.C.C. authority for this load, and they had no trip lease with P.I.E. regarding this load. At the truck stop, Singleton inquired about loads going west. A man from "Marlo" approaced them, looking for a driver to carry a westbound load of freight. After discussing the matter with

Singleton, this individual made a telephone call and then informed Singleton that he had the load.

The Marlo Transport Corporation is a "freight broker" operating in New Jersey. Marlo does not own or lease trucks. It acts as a middleman between shippers who need freight hauled and owner-operators who are seeking loads to haul. The trips arranged by Marlo are generally made under the I.C.C. authority of the owner-operator if he has such authority, or under the authority of the authorized carrier to whom the truck is leased. One of Marlo's methods of locating drivers is to hire "lumpers," who contact drivers at truck stops who are seeking a load going to a certain location.

When Marlo obtains a driver for its shipping customer, the shipper pays the freight charge to Marlo and Marlo then strikes a deal with the driver. Marlo pays drivers by check or in cash, and the driver usually earns approximately 75 percent of the freight charge paid to Marlo.

Brown and Singleton had never hauled for Marlo prior to the trip in question. After striking a deal with Marlo's lumper, Brown and Singleton were escorted to the Franklin Stainless Corporation in New York. There they picked up a load of steel coil to be delivered to Broken Arrow, Oklahoma. The truck was loaded at the Franklin Stainless Corporation and the drivers were given a shipping order which identified "Marlo" as the carrier. Brown and Singleton had no discussions with anyone from Franklin Stainless Corporation, but received their orders from the Marlo lumper. After loading, Brown and Singleton returned to the Marlo Transport Corporation office in New Jersey. An individual at that office accepted the shipping order from Singleton and gave Brown and Singleton a $600 expense advance. This individual instructed Brown and Singleton to return the signed bill of lading evidencing delivery of the load to his office, and they would then be paid the balance due them.

Brown and Singleton then returned to the truck stop and cashed their advance check. They arrived in St. Louis,

Missouri, on November 17, 1978, where they stayed overnight. On the evening of November 18, they left St. Louis following a route which would avoid the weight station on Interstate Highway 44 near Strafford, Missouri. After stopping for the night, Brown was driving the truck South on U.S. Highway 65 early on the morning of November 19, 1978 when the collision occurred.

Witnesses at the scene of the collision identified the worn P.I.E. placard on the truck. The highway patrol officer who investigated the accident testified that Lee Brown, Jr. stated after the collision that he did not have an I.C.C. carrier's bill of lading for the trip.

Brown and Singleton did not have any lease with P.I.E. or any other authorized carrier for this trip. There was no one at the Marlo office in New Jersey who had any relationship to P.I.E. The advance money paid by Marlo was not paid with a P.I.E. check. Brown and Singleton did not stop at any P.I.E. office anywhere during the course of the trip and had no contact with anyone representing P.I.E. in connection with the trip. P.I.E. had no knowledge of the drivers' whereabouts on the trip, and P.I.E. had no right to any of the proceeds from the trip. Singleton testified that he did not believe he was hauling the load from Franklin Stainless Corporation under any P.I.E. lease or permit. He knew that he was hauling "hot freight." He also knew that the load weighed approximately 78,000 pounds and was overweight in some states on their route, including Missouri. He intended to avoid weight stations where their documentation might be checked, and testified that he thought the presence of the P.I.E. placard on the truck would allow them to travel without incident.

No written lease between these drivers and P.I.E. covering this trip, or any other "trip lease" was produced by respondents at trial. A search of P.I.E.'s central records did not locate any "trip leases" or long-term leases between P.I.E. and Brown, Singleton or Tabor.

Presentation of the Federal Question

The federal question was actually raised in these proceedings by respondents, in that their theory of liability against petitioner from the outset at trial and on appeal was based upon the Motor Carrier Act and the I.C.C. regulation adopted thereunder. In their Amended Petition, respondents alleged that Lee Brown, Jr. and Bill Singleton were engaged in a joint venture of transporting goods to obtain a profit and that they were acting within the scope and course of an agency for P.I.E., Equilease Corporation, Marlo Transport Corporation and Roland Tabor. They also alleged that:

> The negligence of defendant Brown is imputed to defendant P.I.E. by reason of the fact that the motor vehicle which Brown was driving at the time of the incident described in the petition and the trip of the truck were conducted pursuant to authority given defendant P.I.E. to operate such vehicle on the designated route and carry goods for hire by the Public Service Commission of the State of Missouri and/or the Interstate Commerce Commission in the United States of America.
> (First Amended Petition, paragraph 15).

Respondents dismissed their cause of action against the drivers Brown and Singleton and the long-term lessee Tabor two days prior to trial. Equilease Corporation had previously prevailed on a Motion for Summary Judgment, and the case thus went to trial against P.I.E., Marlo Transport Company, and the driver of a third automobile, Ralph N. Jenkins.

From the opening moment of this trial, respondents have raised and presented their interpretaion of the I.C.C. regulation as the law of this case. On voir dire examination of the jury, respondents' attorney made at least eighteen separate references to the I.C.C. regulation and specific reference to the placard requirements contained therein (see Appendix J). During trial, respondents' attorney referred to the regulation in opening

statement and respondents offered into evidence and read to the jury the relevant portions of the Motor Carrier Act and the I.C.C. regulation (see Appendix K). Respondents' verdict directing instruction to the jury, Instruction Number 7, was based upon respondents' theory that by virtue of the I.C.C. regulation, respondents were not required to prove or submit to the jury that Lee Brown, Jr. was acting with the scope and course of any employment for petitioner at the time of the accident. Under that instruction, a mere finding that the placard was provided to Brown pursuant to a lease and that it remained on the truck at the time of the accident was sufficient to impose liability (see Appendix L).

A verdict was returned for respondents against petitioner and Marlo, and judgment was entered on February 4, 1982, in the amount of $750,000 (see Appendix C).

Petitioner filed Motions for Judgment Notwithstanding the Verdict and for a new trial, which raised the issue of respondents' failure to submit the scope and course of employment issue to the jury (see Appendix M). Those motions were overruled on May 13, 1982. Petitioner filed its Notice of Appeal to the Missouri Court of Appeals, Southern District on May 20, 1982.

The Briefs in the Missouri Court of Appeals, Southern District, clearly present and preserve the federal question. Respondents' Brief set forth the provisions of the Motor Carrier Act and the I.C.C. regulation at issue. In their Brief, respondents contended that the issue of scope and course of employment was not required to be submitted to the jury even though petitioner did not participate in the trip in question because the I.C.C. regulation imposes vicarious tort liability for a driver's negligence when a carrier fails to remove its identifying placard from a truck (see Appendix N). In petitioner's Reply Brief in the Missouri Court of Appeals, Southern District, Petitioner cited and relied upon Section 304(e)(2) of the Motor

Carrier Act[1] for its contention that petitioner as a lessee of the truck must be treated as if it were an owner of the truck, and that scope and course of employment therefore remains an indispensable element of respondents' case (see Appendix O). The Missouri Court of Appeals, Southern District rendered its 3 to 1 opinion affirming the judgment of the trial court on April 18, 1983 (Appendix B).

Petitioner presented and preserved the federal question regarding construction and interpretation of the Motor Carrier Act in its Application for Transfer to the Supreme Court of Missouri, which was granted on June 30, 1983 (see Appendix P). The federal question of construction and interpretation of the interplay between the Motor Carrier Act and the I.C.C. regulations promulgated thereunder was again presented in petitioner's Supplemental Brief (see Appendix Q) and respondents' Brief (see Appendix R).

On December 20, 1983, the Supreme Court of Missouri rendered its 4 to 3 judgment and opinion, again affirming the judgment of the trial court. As noted in the Jurisdictional Statement of this Petition for Writ of Certiorari, the majority opinion cited and relied upon the I.C.C. regulation in issue, ruling that petitioner could be held liable for the driver's negligence without regard to scope and course of employment upon a finding that a placard was furnished by petitioner in connection with a lease and that the placard remained on the truck at the time of the accident. At page 19 of majority Opinion, the Supreme Court of Missouri stated that:

> The conclusion we reach is based upon statutory policy rather than a conventional respondeat superior theory. It is based on the failure to comply with an explicit of the governing regulations . . .
> (See Appendix A).

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[1] Petitioner mistakenly referred in its Reply Brief to 49 U.S.C. Section 304(e)(2), the earlier but nearly identical codification of the statute relied upon. 49 U.S.C. Section 11107(a)(Supp. 1983).

Petitioner filed its Motion for Rehearing in the Supreme Court of Missouri on December 7, 1983. In that motion, petitioner again raised the federal question of the construction and interpretation of the Motor Carrier Act and its interplay with the I.C.C. regulation. In addition, petitioner raised a federal Constitutional claim that if the majority opinion of the Supreme Court of Missouri had correctly interpreted the intent of the I.C.C. regulation, then that regulation exceeded the delegated authority of the I.C.C. under the Motor Carrier Act and was in violation of Article I, Section 1 of the United States Constitution, providing that:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.
> (See Appendix S).

Petitioner therefore submits that the federal question was raised, presented and preserved at trial and throughout the course of the appellate proceedings in this matter. Indeed, the federal question is the very foundation of respondents' case against petitioner. The judgment and majority Opinion of the Missouri Supreme Court is expressly based upon the federal question and this court, therefore, has jurisdiction to entertain this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

The Missouri Supreme Court's Interpretation Of The I.C.C. Truck Leasing Regulation Denies To Petitioner Its Rights Under The Motor Carrier Act To Be Treated Like An Owner Of The Leased Truck, And Its Immunity From Tort Liability Under The Motor Carrier Act For The Unauthorized Acts Of A Driver After Expiration Of A Lease.

The evidence produced by respondents at trial was insufficient to establish vicarious liability of petitioner under traditional common law doctrines. There was no evidence that Lee Brown, Jr. was acting within the scope and course of any employment for P.I.E. on the trip, and P.I.E. received no monetary benefit from his activities. Any leases between P.I.E. and Brown had expired by their terms. All of the evidence showed that P.I.E. had absolutely no connection with the trip.[2]

Respondent's theory of liability instead rested entirely upon an interpretation of the regulatory scheme of the I.C.C. regulation governing truck leasing, 49 C.F.R. 1057.4(a)(4)(1978). The regulation provides for the exclusive possession, control and use of the truck, and the complete assumption of responsibility therefor by the motor carrier during the term of any lease. Subsection (d) of the regulation requires the carrier to display identifying placards on the leased truck during the lease and to remove them at the end of the lease. Respondents contend that because petitioner failed to get a placard back from Brown, its

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[2] Petitioner does not contend, and has never argued, that it is not fully responsible for the negligence of a driver of leased equipment while the truck is carrying P.I.E.'s goods or serving P.I.E.'s business interests. It is the imposition of vicarious liability for the unauthorized acts of a driver not under lease to P.I.E., and which P.I.E. indisputably had no knowledge or control over, of which petitioner complains.

single trip lease with Brown and Singleton continued in effect indefinitely, and petitioner is therefore liable for the negligent acts of Brown without regard to whether he was serving petitioner's business interests when the accident occurred.

The Supreme Court of Missouri *broadened* respondents' analysis of the vicarious liability imposed by the regulatory scheme. The court below held that the mere continued presence of an identifying placard on the truck was sufficient to impose vicarious liability upon petitioner, without holding that any trip lease with the drivers had continued in effect. *Johnson v. Pacific Intermountain Express Company,* 662 S.W.2d 237, 245-246 (Mo. banc 1983) (4-3 decision) (see appendix A). Focusing on the placard, the court below stated that its holding centered:

> [O]n the appearance of authority created and maintained when a sign is issued and not retrieved. It was not necessary, then, for the plaintiff to show that the truck was on an actual mission for P.I.E. at the time of the accident. . . . *P.I.E.'s liability is based on appearances, not on actualities.*
>
> *Id.* at 246. (emphasis added).

This interpretation of the regulation conflicts with the explicit language of Section 11107(a)(4) of the Motor Carrier Act, which provides that a carrier using leased equipment is to be treated as if it were the *owner* of that equipment. 49 U.S.C. Section 11107(a)(4)(Supp. 1983). If P.I.E. had owned this truck, it would not have been vicariously liable for respondents' damages. No federal statute or I.C.C. regulation imposes absolute civil tort liability upon a truck owner for an unauthorized use of its truck.[3] See *Johnson v. Pacific Intermountain Express*

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[3] Petitioner has scoured the legislative history of the Motor Carrier Act and the administrative proceedings leading to the promulgation of the I.C.C. leasing regulations. Petitioner has found nothing in those sources indicating that Congress or the I.C.C. intended the regulatory scheme to impose absolute vicarious liability upon a carrier whose

Company, 622 S.W.2d 237, 247 (Mo. banc 1983) (Welliver, J., dissenting). Rather, the tort liability of a truck owner is determined by reference to common law principles of vicarious liability, which require a claimant to prove that the driver was acting within the scope and course of his employment and serving the business interests of the truck owner at the time of the accident.[4] The Missouri Supreme Court's Opinion denies to

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placard was retained by an owner-operator at the end of a lease and remained on the truck at the time of an accident. Rather, the entire history of the regulatory scheme indicates that it was intended to remedy a very specific evil—the widespread practice by motor carriers in the 1940s and 1950s of leasing trucks under contracts denominating the owner-operator as an *independent contractor*. Under such leases, financially irresponsible owner-operators, so called "gypsy truckers," were loosed upon the highways without any control or supervision by the authorized carriers. Under prevailing common law rules, the carriers were insulated from liability for the gypsy trucker's negligence even while its *own goods* were on the truck. The regulatory scheme sought to correct this abuse by constituting the owner-operator a statutory employee of the carrier during the term of the lease. Thus, the carrier would always be financially responsible for any trip, including a return trip, where that carrier's cargo was involved or its business interests were being served. See *American Trucking Associations v. United States*, 344 U.S. 298, 309-310 (1952); *Sen. Rep. No. 1271*, 84th Cong. 1st Sess. at 1-3 (1955); *H.R. Rep. No. 2425*, 84th Cong., 2d Sess. at 2-4 (1956); *Ex Parte MC-43, Lease and Interchange of Vehicles by Motor Carriers*, 51 M.C.C. 461, 52 M.C.C. 674, 64 M.C.C. 361, 68 M.C.C. 553, 79 M.C.C. 65, 79 M.C.C. 251, 84 M.C.C. 297, 86 M.C.C. 525; *Ex Parte Mc-41 Identification of Motor-Carrier Vehicles*, 12 C.F.R. 2203. I.C.C. reports under *Ex Parte Mc-43* indicate that a primary reason for issuance of the leasing regulations was to ensure that carriers would inspect leased vehicles for violations of I.C.C. safety regulations. The I.C.C. reports do not intimate that the Commission ever contemplated imposing strict liability upon motor carriers simply because their placard was attached to a vehicle. There is no indication in the legislative or administrative history that the motor carrier was intended to be made an insurer of the travelling public for accidents occurring after termination of a lease.

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[4] This Court has held that common law remedies are preserved under the Motor Carrier Act to the extent that they are in harmony with its regulatory scheme and purpose. *Pennsylvania R. Co. v. Son-*

petitioner its claimed right, under the Motor Carrier Act, to be treated like an owner of the truck and to be immune from civil tort liability for the unauthorized negligent acts of the driver after the lease ended.

II.

The Petition For Writ Of Certiorari Should Be Granted To Resolve The Widespread Conflict In The Interpretation Of The Motor Carrier Act And The I.C.C. Truck Leasing Regulation Existing Under The Decisions Of The Missouri Supreme Court In This Case, Other State Courts Of Last Resort And Several Federal Circuit Courts Of Appeal.

The need for Supreme Court review of the interplay between the Motor Carrier Act and the I.C.C. regulation has been alluded to in several reported decisions, including the majority Opinion of the Missouri Supreme Court here. *Johnson v. Pacific Intermountain Express Company*, 662 S.W.2d 237, 243 (Mo. banc 1983) (4-3 decision); *Schedler v. Rowley Interstate Transportation Company, Inc.*, 368 N.E.2d 1287, 1289 (Ill. 1977). At present, there is a decided conflict in the interpretation of the statutory and regulatory scheme among state appellate courts and federal circuit courts of appeal. See Supreme Court Rule 17.1(b).

One distinct line of cases adopts the interpretation of the statute and regulations urged by petitioner. In *Wilcox v. Transamerican Freight Lines, Inc.* 371 F.2d 403 (6th Cir. 1967), the driver of a leased truck had completed a trip for the carrier and was on his way home in the tractor at the time of the accident. In light of evidence that the driver was not engaged in the carrier's business nor doing anything for the carrier's benefit at the

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man Shaft Coal Co., 242 U.S. 120, 123-124 (1916). See also *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962). Common law principles of vicarious liability are fully consistent with the express language of the Act (lessee-carrier is to be treated like an owner of the truck) and the original purpose of the leasing regulation (to prevent truck leasing by independent contractors).

time of the collision, the Court of Appeals affirmed a summary judgment in favor of the carrier, stating:

> In our opinion, the I.C.C. regulations do not impose a liability on a carrier using leased equipment greater than that when operating its own equipment. Under Ohio law, liability of an owner of a motor vehicle for the acts of his employee, is governed by the principle of respondeat superior . . . If one of the owner's vehicles was being operated by an employee with permission but on a mission of the employee's own, the owner cannot be held liable. The same rule applies to leased equipment.
> *Id.* at 404.

In *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579 (1969), an owner-operator driving a truck bearing the carrier's I.C.C. permit had an accident after completing a delivery for the carrier, while driving the tractor to his home without a trailer. Even though the carrier was ultimately found liable for the driver's negligence, the Court of Appeals determined that issue based upon whether the driver was "engaged in the activities of the carrier" at the time of the collision. *Id.* at 589. This "agency" analysis would have been totally unnecessary if the I.C.C. regulation imposed *absolute* liability for the presence of the carrier's placards.

In *Gackstetter v. Dart Transit Company*, 130 N.W.2d 326 (Minn. 1964), a truck leased to an I.C.C. carrier was involved in an accident. The Minnesota Supreme Court found that the driver had been on a purely personal mission and held that the I.C.C. carrier could not be subjected to vicarious liability even though the truck was being used with the carrier's permission.[3]

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[3] See also *Kaplan Trucking Co. v. Lavine*, 253 F.2d 254 (6th Cir. 1958); *Schmidbauer v. Baltimore & P. Motor Exp. Co.*, 228 Md. 637, 181 A.2d 325 (1962).

The other line of cases follows the reasoning of the Supreme Court of Missouri in this case, at least in part. Those cases impose vicarious liability upon the I.C.C. carrier for the negligence of a driver, if the carrier failed to obtain a return of its placards and they remained on the leased truck. The leading case is *Mellon National Bank and Trust Company v. Sophie Lines,* 289 F.2d 473 (3d Cir. 1961). There a 30 day lease of the truck was in effect and the carrier's signs were displayed on it. The driver used the truck for an unauthorized haul of lumber and had an accident en route. The carrier had no monetary interest in nor knowledge of that trip. The Court of Appeals, interpreting the I.C.C. regulation, found the carrier liable due to the presence of its signs and the appearance of authority they created, even though common law liability would not have attached.

A similar result was reached in *Rodriguez v. Ager,* 705 F.2d 1229 (10th Cir. 1983). There, despite the carrier's lack of knowledge of the trip, it was held that the presence of the carrier's placards, furnished under a continuing lease, subjected it to responsibility for the driver's negligence under the I.C.C. regulation.[6]

However, the majority of these cases involve accidents which occurred *during the term of the lease,* presumably at a time when the carrier had a right of control over the driver and a right to receive monetary benefit from his operations.[7] In addi-

[6] See also *Wellman v. Liberty Mut. Ins. Co.,* 496 F.2d 131 (8th Cir. 1974); *Simmons v. King,* 478 F.2d 857 (5th Cir. 1973); *Cosmopolitan Mut. Ins. Co. v. White,* 336 F.Supp. 92 (D. Del. 1972); *Hodges v. Johnson,* 52 F.Supp 488 (W.D. Va. 1943); *Kreider Truck Service, Inc. v. Augustine,* 76 Ill. 2d 535, 394 N.E.2d 1179 (1979); *Leotta v. Plessinger,* 8 N.Y.2d 449, 171 N.E.2d 454 (1960); *Felbrant v. Able,* 194 A.2d 491 (N.J. 1963).

[7] *Wellman v. Liberty Mut. Ins. Co., supra; Simmons v. King, supra; Rodriguez v. Ager, supra; Mellon Nat'l. Bank & Trust Co. v. Sophie Lines, Inc, supra; Cosmopolitan Mut. Ins. Co. v. White; supra; Hodges v. Johnson, supra; Kreider Truck Service, Inc. v. Augustine, supra; Cox v. Bond Transportation, Inc., supra; Felbrant v. Able, supra.*

tion, the I.C.C. carrier in most of these cases was at least initially responsible for sending the truck on the trip, and the accident happened either after delivery of the goods while the driver was using the truck on a personal mission or during a return trip with an empty truck immediately after the conclusion of the trip for the carrier. In the present case no lease remained in effect at the time of the accident, and P.I.E. was not involved in sending the truck on the trip. *Thus, the Supreme Court of Missouri has stretched the interpretation of the I.C.C. regulation further than any other court which has construed it.*

Two prior Missouri cases have addressed the issue of scope and course of employment and the I.C.C. regulation. In *Brannaker v. Transamerican Freight Lines, Inc.* 428 S.W.2d 524 (Mo. 1968) and *Duke v. Thomas,* 343 S.W.2d 656 (Mo. App. 1961), the courts' decisions indicate that the issue of scope and course of employment remains present in *any* I.C.C. carrier case. The *Brannaker* court explicitly relied on the provision of the Motor Carrier Act requiring that the carrier be treated as if he owned the truck, and stated that scope and course of employment was in issue *despite* the presence of the carrier's placards since there was evidence in the case that the driver was on a purely personal mission at the time of the accident. *Id.* at 529, 534. In *Duke v. Thomas, supra,* the court found the carrier liable based upon sufficient evidence that "at the time of the accident he was acting within the scope of his employment." *Id.* at 660. The Opinion of the the Missouri Supreme Court in this case does not expressly overrule either of these prior decisions in Missouri. Instead, it distinguishes them on the ground that the prior cases involved "purely personal missions" by the drivers while the leased trucks were empty, whereas the truck in the present case was loaded with regulated freight (662 S.W.2d at 244-246). Thus, there is confusion even within the State of Missouri as to the exact interpretation of the I.C.C. regulation and its effect on the carrier's tort liability.

The Missouri Supreme Court's majority Opinion departs from all other cases interpreting the federal regulation in impos-

ing the requirement that the claimant prove the truck was hauling "dry regulated freight" at the time of the accident. There is no hint in the regulatory scheme that the carrier's liability is dependent upon whether the truck is loaded or unloaded at the time of the accident. This new requirement imposed by the court below is in direct contradiction to decisions in numerous other jurisdictions, which have imposed vicarious liability on an I.C.C. carrier for an accident occurring while the truck is *empty*, prior to picking up a load or a return trip after carrying a load for that carrier.[1]

As this Court has often noted, review by certiorari is advisable where serious conflicts in the interpretation of federal statutes and regulations have arisen in the decision of state courts of last resort and federal circuit courts. *Missouri Pacific Railroad Company v. Elmore & Stahl*, 377 U.S. 134 (1964); *United States v. Oregon*, 366 U.S. 643 (1961). Just such a conflict is apparent here, and petitioner submits that the writ should be granted. Supreme Court Rule 17.1(b).

III.

The Petition For Writ Of Certiorari Should Be Granted To Resolve The Issue Of The Validity, Under Article I, Section 1 Of The United States Constitution, Of The I.C.C. Truck Leasing Regulation Created By The Decision Of The Missouri Supreme Court Below.

The Opinion below also creates an issue of Constitutional magnitude as to the validity of the I.C.C. regulation. A literal reading of the Motor Carrier Act requires that a carrier using leased trucks be treated as if he owned the truck. Even under

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[1] *Rodriguez v. Ager, supra,; Cosmopolitan Mut. Ins. Co. v. White, supra; Schedler v. Rowley Interstate Transp. Co., supra; Duke v. Thomas, supra; Felbrant v. Able, supra; Cox v. Bond Transp., Inc., supra.* See also *American Transit Lines v. Smith*, 246 F.2d 86 (6th Cir. 1957).

the I.C.C. regulation, an owner's liability is dependent upon whether the driver is acting in the scope and course of his employment. If the I.C.C. regulation is interpreted to impose liability upon the carrier without regard to scope and course of employment of the driver, then the regulation contradicts the express language of the Motor Carrier Act and exceeds the scope of the I.C.C.'s delegated authority. Thus, the interpretation of the I.C.C. regulation adopted by the Supreme Court of Missouri raises Constitutional issues under Article I, Section 1 of the United States Constitution. Review by this Court, construing the Motor Carrier Act and the I.C.C. regulation together, could dispel this Constitutional cloud.

IV.

The Petition For Writ Of Certiorari Should Be Granted To Resolve The Conflicting Interpretations Of The Motor Carrier Act And The I.C.C. Truck Leasing Regulation, To Provide Guidance For The Motor Carrier Industry And Protection To The Travelling Public.

In addition to the conflict among decisions in various jurisdictions on this issue, important policy reasons favor the granting of this Writ. The use of leased trucks in interstate commerce is extremely widespread.[9] A shifting demand for transport equipment in different regions during different agricultural and business seasons makes the use of independent owner-operators' equipment more efficient than the

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[9] For example, in 1980, of the 354,211 total Class 1 and Class 2 motor carrier trucks hauling general freight, 73,268 units were rented with a driver and 37,863 were rented without drivers. More significantly, trucks operated by Class 1 and Class 2 motor carriers drove approximately 17.5 billion highway miles hauling general freight in 1980.Trucks owned by the motor carriers accounted for approximately 9.4 billion of those miles; but approximately 5.5 billion miles were driven by trucks rented with drivers and approximately 2.5 billion miles involved trucks rented without drivers. See *Trinc's Blue Book of the Trucking Industry* (1981 ed.), published by Trinc's Transportation Consultants, McLean, Va.

maintenance of large fleets of centrally based trucks.[10] Of necessity, leases of this independently owned equipment are frequently for single trips or short terms, creating an avalance of documentation and identifying placards which the motor carrier industry simply cannot police to perfection. The uncertainty created by the conflict in the numerous decisions interpreting the regulatory scheme shoulders the motor carrier industry with tremendous potential liability for unauthorized acts of owner-operators, and makes proper business and insurance planning impossible. At present, the law governing motor carriers and their corresponding tort liability changes as leased trucks cross state and federal circuit lines. The rights of injured claimants to obtain compensation may depend solely upon the fortuitous circumstance of where an accident occurs or which "version" of the federal law is to be applied.

The majority below justifies its decision, in part, on the ground that:

> [O]ne important purpose of the regulatory scheme is to protect persons who are injured in highway accidents, by increasing the likelihood that a substantial entity will be available to respond to any judgment rendered.
> 662 S.W.2d at 243.

While this purpose is laudable, there simply is no support in the language or history of the Motor Carrier Act for imposing *strict liability* on an entity not factually responsible for an injured claimant's damages without proof of an existing lease. Furthermore, imposing strict liability upon carriers under a "placard law" will not stop the carnage caused by irresponsible truckers hauling "hot freight." That purpose will be ac-

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[10] This economic fact was recognized by the Congress and the I.C.C. in the proceedings leading to the adoption of the agricultural commodities exemption from I.C.C. regulations. See 49 U.S.C. Section 10526(a)(6)(b)(Supp. 1983) and authorities cited note 2 *supra*. See also *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 35 (1975).

complished only if the freight broker and shipper are made responsible for assuring that a driver shows a lease with an authorized I.C.C. carrier before giving him a load of freight.

Petitioner submits that it is time for this Court to address the conflicting interpretations of the Motor Carrier Act and the I.C.C. regulation governing leased trucks. The I.C.C. carrier's continuing responsibility under the federal "placard law" must be resolved. This case clearly falls within the Court's jurisdiction, and petitioner respectfully requests the Court to exercise its reasoned discretion and grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

Cathy Jean Johnson, and Thomas Ray Boatz Johnson and Rebecca Joyce Johnson by their next friend Cathy Jean Johnson,

Plaintiffs-Respondents,

v.

Pacific Intermountain Express Co., and Marlo Transport Corporation,

Defendants-Appellants.

No. 65102.

Supreme Court of Missouri, En Banc.

Nov. 22, 1983

As Modified on Denial of Rehearing Dec. 20, 1983.

BLACKMAR, Judge.

Thomas Johnson was killed November 19, 1978 in a collision in Dallas County between a car in which he was a passenger and a 1978 Kenworth tractor trailer unit, leased by Tabor and driven by Brown. His widow, Cathy, and minor children obtained judgment against Pacific Intermountain Express Co. (P.I.E.) and Marlo Transport Corporation, for $750,000. No issue was preserved as to the negligence of Brown or as to the amount of the verdict. The defendants appealed to the Missouri Court of Appeals, Southern District, which affirmed with one dissent as to P.I.E. We transferred the case and now decide it as on original appeal. We likewise affirm.

The only assertion of trial error is easily disposed of. Cathy, prior to the trial, had married Samuel Lower. She continued to use the name "Cathy Jean Johnson," and on May 1, 1981 the

Circuit Court of Webster County entered an order "reaffirming" that name for her. Before trial of the case the plaintiffs sought and obtained an order in limine, suppressing reference to Cathy's marriage to Lower, to her surname as Lower, and to Lower as her husband. The jurors were questioned on voir dire as to acquintanceship with Lower, but without identifying him as Cathy's husband, and none responded. There was evidence of "household services" performed by Thomas Johnson, and the defendants sought to introduce evidence of the remarriage to show that Lower was available in Johnson's stead. They also complain of Cathy's use of the name Johnson, citing cases holding that a witness in her situation must answer with her "true" name.[1]

[1,2] The point is not well taken. A married woman may take a name which is not that of her current husband. *Matter of Natale,* 527 S.W.2d 402 (Mo.App.1975). Cases holding that a witness must give her true name, relying on a cautionary instruction to dispel possible prejudice, are not in point because Cathy answered with her true legal name. The reference to Lower's potential household services in mitigation of damages is no more appropriate than is mention of his potential earnings.[2] The defendants understandably wanted the jury to know about Cathy's remarriage in the hope that they would take this into account in determining damages in spite of any cautionary instruc-

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[1] Defendants cite *Duebelbeis v. Dohack,* 615 S.W.2d 488 (Mo.App.1981) and *Glick v. Allstate Insurance Co.,* 435 S.W.2d 17 (Mo.App. 1968).

[2] Missouri courts have consistently held that a cause of action for wrongful death is not abated by remarriage nor may the remarriage be considered in mitigation of damages. *See, e.g., Glick v. Allstate Insurance Co.,* 435 S.W.2d 17, 23 (Mo.App.1968); *Katz v. North Kansas City Development Co.,* 223 Mo.App. 606, 14 S.W.2d 701, 709 (1929); *Platt v. Cape Girardeau Bell Telephone Co.,* 12 S.W.2d 933, 936 (Mo.App. 1929); *Davis v. Springfield Hospital,* 204 Mo. App. 626, 218 S.W. 696, 700 (1920).

tions that might be declaimed. Here no untrue statements were made and the jury was not deprived of any information it had a right to have. No purpose would be served by telling the jurors about the remarriage and then instructing them to disregard the information.

The remaining questions have to do with the vicarious liability of P.I.E. and of Marlo. Each argues vigorously that it is not liable. This requires detailed consideration of the evidence as to the ownership, leasing and operation of the 1978 Kenworth, taken most strongly from plaintiffs' standpoint.

Tabor, a resident of St. Louis, owned or leased two tractors, each of which operated with a trailer in an 18-wheel unit. He secured the services of Brown and of Singleton as drivers, and would sometimes operate with them so as to provide three drivers for the two vehicles. There was a conflict in the testimony as to whether the drivers received fixed compensation or a share of the earnings. Brown, who was apparently the principal operator of the 1978 Kenworth, died of natural causes after the accident in issue, and evidence about the operation of that vehicle came primarily from Singleton.

None of the three had any kind of Interstate Commerce Commission or state authority for the transportation of freight. After the 1978 Kenworth was acquired a pattern of operation was developed in which a load of produce would be picked up on the West Coast and hauled to the East Coast. Agricultural products are exempt commodities which require no operating authority for shipment in interstate commerce.[1] After the produce was unloaded the drivers would look for a westbound load, which would usually involve the leasing of the equipment to a common carrier possessing ICC authority. Leases of this kind are permitted by ICC regulations, under conditions which

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[1] 49 U.S.C. § 303(b)(6) (1976) (now 49 U.S.C. § 10526(a)(6)(B) Supp. V 1981) provided the exemption from operating authority for the shipment of agricultural commodities in interstate commerce.

are very important to this case and will be discussed in detail at a later point. The regular drivers would then drive the loaded vehicle to the destination specified by the carrier, after which another exempt eastbound load of produce would be sought.

P.I.E. is a major interstate carrier of freight. Although it disclaimed any knowledge at all of any lease or other dealing with Brown, Tabor, or Singleton, the latter two testfied to the several trips by the 1978 Kenworth under lease to P.I.E. Singleton told of a visit to a P.I.E. terminal in New Jersey, which had a sign identifying it as such, in which he dealt with a man named Ray Dean, who directed the loading of the trailer and provided advance money for expenses. Dean delivered shipping documents, including a trip lease, which were carried with the vehicle, and signs or placards evidencing operation under P.I.E. authority, which were affixed to the tractor. On the first trip Dean told Singleton that he could either mail the signs in at the end of the trip or bring them back with his next eastbound load. Singleton elected the latter option. There were more westbound trips under P.I.E.'s authority, arranged with Dean. The precise number of these is not clear, but the jury could have found at least three. At the beginning of the second trip another set of signs was furnished. Dean did not ask that these be returned, and at least one of them remained on the truck until the accident. The truckers' copies of the trip leases were apparently discarded at the end of each run. Tabor testified about receiving payments from P.I.E. and dealing with a P.I.E. representative in East St. Louis.

Although the evidence is sketchy, the jury could have found that the 1978 Kenworth made its last westbound trip under P.I.E.'s operating authority 10 or 12 days before the accident, that it carried signs previously furnished by P.I.E., that P.I.E. made no effort to collect the signs at the end of the run, and that at least one sign was on the tractor at the time of the accident. There is no evidence, however, that the fatal trip was carried on under P.I.E.'s authority or with its knowledge, or that P.I.E. had any interest in the revenues. Any claim the plaintiffs have

against P.I.E., then, must depend on a constructive agency derived from the federal statutes and regulations adopted by the Interstate Commerce Commission pursuant to those statutes.

The load for the fatal trip was arranged by defendant Marlo Transportation Company, which is a "freight broker." A freight broker exists to put shippers in touch with truck operators. Marlo does not operate trucks and has no ICC or other operating authority. Marlo learned that the 1978 Kenworth was available for a westbound trip, and arranged for a load of steel to be hauled from the plant of Franklin Stainless Corporation in New York to a consignee at Broken Arrow, Oklahoma. An employee of Marlo accompanied the rig to the plant and back to Marlo's place of business in New Jersey. The P.I.E. sign was on the vehicle at the time. The jury could have found that Marlo was aware of the sign and that it knew that this shipment had no connection whatsoever with P.I.E. It could also find that Marlo knew that the shipment would be carried without valid operating authority of any kind, and was indifferent to this absence of authority.

The unit, besides operating without authority, carried a load which was over the weight limits for several states on the route. The drivers selected a route designed to avoid weight stations. Singleton testified that the P.I.E. sign might be helpful in avoiding "policemans and highway patrolmans." There is no evidence that Marlo was aware of the overload, specified the route to be followed, or took note of possible involvements with "the law."

Marlo paid an advance to the drivers before the trip began. There was evidence that Marlo was to collect the freight charges from the shipper or the consignee, retaining 25% and remitting the balance to Tabor. The evidence as to the actual monetary settlement following the accident was not developed, and seems immaterial.

1. Marlo's Liability

The issue of Marlo's liability was submitted by an instruction[4] requiring findings on issues now disputed, as follows:

INSTRUCTION NO. 8

> Your verdict must be for plaintiffs Cathy Johnson, Thomas R. Johnson, and Rebecca Johnson and against defendant Marlo Transport Corporation if you believe:
>
> * * * * * *
>
> Second, Lee Brown, Jr., was operating the Kenworth Truck within the scope and course of his agency for Marlo Transport Corporation at the time of the collision, and
>
> * * * * * *
>
> Acts were within the "scope and course of agency" as that phrase is used in this instruction if:
>
> 1. They were performed by Lee Brown, Jr. to serve the interests of Marlo Transport Corporation according to an express or implied agreement with Marlo Transport Corporation either controlled or had the right to control the physical conduct of Lee Brown, Jr.

Marlo argues, vigorously, that there is no right to control, Brown as he headed west with the truck. It asserts that it properly retained the proprietor of the truck, (whether Tabor, Brown, Singleton, or some combination of the three) as an independent contractor, to achieve a particular result by means chosen by the contractor, that it had no right to control the truck as to the details of operation, and that there is no basis for vicarious liability. These arguments, if sound, would result in judgment for Marlo notwithstanding the verdict.

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[4] This instruction is based on MAI 13.06.

Perhaps it will be helpful first to explore the practicalities of the situation rather than the legalities. Marlo was in touch with a customer who had a truckload of steel. It was looking for a truck. Brown and Singleton had a truck provided to them by Tabor, who had leased it, and, with full authority from Tabor, were trying to locate payloads. Marlo and the truckers got together on a proposition to haul a load for Franklin Steel to Broken Arrow, Oklahoma. They did not put the details in writing but rather operated informally. Marlo was to collect from the customer, retain 25%, and remit the balance to Tabor. Nobody seemed to have the least concern about the total absence of operating authority.

Now let us return to the legalities. The arrangement can best be described as a "joint venture." The parties undertook a particular project, for mutual benefit and profit. It makes no difference whether the venturers are Marlo and Tabor, with Brown and Singleton considered to be servants of the venture, or whether Tabor, Brown and Singleton are to be considered as acting together on one side of the venture with Marlo on the other.

[3-6] A joint venture is a species of partnership.[5] The distinction between a joint venture and a conventional partnership is that the former exists for a particular, defined purpose. Although a joint venture is a consensual arrangement, no particular formalities are necessary. There may perfectly well be a joint venture for a single truck haul.[6] There is a mutual agency

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[5] *See Howard v. Winebrenner*, 499 S.W.2d 389, 396 (Mo.1973); *Jeff-Cole Quarries, Inc. v. Bell*, 454 S.W.2d 5, 15 (Mo.1970); *Swindell v. J.A. Tobin Construction Co.*, 629 S.W.2d 536, 542 (Mo.App.1981).

[6] A "joint adventure" is often defined as an association of two or more persons to carry out a single business enterprise for profit. *See Howard v. Winebrenner*, 499 S.W.2d 389, 396 (Mo.1973); *Jeff-Cole Quarries, Inc. v. Bell*, 454 S.W.2d 5, 15 (Mo.1970); *Bell v. Green*, 423 S.W.2d 724, 731 (Mo. banc 1968); *Pigg v. Bridges*, 352 S.W.2d 28, 33 (Mo. banc 1961).

among the venturers for activities within the scope of the venture, and all have equal right of control.[7] Venturers, moreover, are jointly and severally liable for torts committed within the scope of the venture.[8]

[7] Marlo, then, was instrumental in launching and directing the truck journey. This is not a situation in which Marlo should be allowed to escape liability by asserting independent contractor status. Our courts have been hesitant to uphold claims for this kind of immunity. There is a distinct tendency to find that truck operators are agents or servants rather than independent contractors.[9] Marlo's case is not helped by the fact that it did not try to place the load with a regular, certified carrier, having regular routes and published tariffs, but rather did business with itinerant truckers with no semblance of operating authority. It is easier to find an independent contractor relationship when the purported contractor holds itself out to the public as having a regular and established business.[10] But the illegality of the operation is not the controlling circumstance. The usual rule holds those who engage in business for profit liable in damages,

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[7] As a general rule in order to constitute a joint venture there must be a mutual right of control. *Howard v. Winebrenner*, 499 S.W.2d 389, 396 (Mo.1973). *See also supra* note 6.

[8] *See supra* note 6.

[9] *See, e.g., Madsen v. Lawrence*, 366 S.W.2d 413, 415 (Mo.1963), where this Court held that the trial court did not abuse its discretion in granting a new trial where substantial evidence introduced in the case justified a finding that a driver of a dump truck was a servant rather than an independent contractor in a personal injury suit against the defendant-excavator. appropriate factors are set out in Restatement (Second) of Agency § 220 (1958), which our courts have followed with some regularity.

[10] *Cf. King v. Young*, 107 So.2d 751 (Fla.App. 1958); *Gross v. Eustis Fruit Co.*, 160 So.2d 55 (Fla.App.1964), involving freight brokers who arranged loads with certified carriers.

on the usual negligence principles, to those who are injured in the course of the business operations. There is no reason to relieve Marlo of this normal and usual liability.

[8] Marlo is not being held liable on a theory which was not submitted to the jury. The instruction clearly submitted agency, with its constituent elements of benefit and right of control. Marlo, of course, could not exercise effective control while the truck was on the highway but, as is usual in joint ventures, the participants had their assigned roles in the total project. No showing of right of control over and above that which follows as of course from a showing of joint venture need be made. The instruction is supported by the evidence, and the verdict was properly rendered on it.

2. P.I.E.'s Liability

The question of P.I.E.'s liability requires a more intricate legal analysis. There is no claim, and no evidence, that the truck was on a mission for P.I.E. at the time of the fatal accident. The plaintiffs, rather, seek to establish the vicarious liability of P.I.E. through the provisions of the Interstate Commerce statutes, and regulations adopted by the Interstate Commerce Commission pursuant to those statutes, governing the use by certified carriers of rolling stock belonging to others.

The verdict directing instruction[11] required findings on disputed issues as follows:

* * * * * *

> Second, Pacific Intermountain Express Company leased the truck driven by Lee Brown, Jr. and provided a sign to be displayed on the truck identifying Pacific Intermountain Express Company as the carrier, and

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[11] Based on MAI 13.06, 17.13, 19.01 and 20.02 modified.

Third, Pacific Intermountain Express Company failed to remove the sign from the truck before the collision of November 19, 1978, and

* * * * * * *

All hypotheses of this instruction are supported by the evidence. The question is whether the instruction submits all the contested facts necessary to support a recovery against P.I.E.

Motor carriage of freight in interstate commerce is closely regulated. Regulation of leases of rolling stock by a certified carrier for use in operations under its certificate is especially strict.[12] One important purpose of the regulatory scheme is to protect persons who are injured in highway accidents,[13] by increasing the likelihood that a substantial entity will be available to respond to any judgment rendered. The federal statute and regulations have been held, in numerous cases from different jurisdictions, to have a definite and substantial impact on tort liability. These holdings are not mandated by any controlling authority from the Supreme Court of the United States, but rathter represent the consensus of judicial authority based on analysis of statutory policy and implementing regulations.

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[12] The regulations codified at 49 C.F.R. § 1057.4(1978), provide that an authorized carrier may lease non-owned equipment so long as the lease provides for "exclusive possession, control, and use of the equipment" for the duration of the lease. Such leases must specify their duration, which in most circumstances may not be less than 30 days. Regardless of the minimum duration stated in the lease, the carrier is nevertheless obliged to (1) obtain a signed receipt from the lessor for return of the equipment, and (2) remove its identifying signs and placards.

[13] In *American Trucking Ass'ns v. United States*, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1953), the United States Supreme Court recognized that the strict regulatory scheme imposed on authorized carriers was designed to provide a financially responsible party to stand behind any interstate trucking operation which negligently injures members of the traveling public. *See also Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 96 S.Ct. 229, 46 L.Ed.2d 169 (1975); *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972); *Rodriguez v. Ager*, 705 F.2d 1229 (10th Cir.1983).

This Court has spoken on the subject only in *Brannaker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524 (Mo.1968). Both the plaintiff and P.I.E., understandably, try to glean support in *Brannaker* for their respective positions. There the plaintiff sued for damages sustained in a collision with a tractor-trailer unit owned by Murray, but bearing signs indicating operation under the authority of Sykes Transport Company, a certified carrier. Murray had leased the unit to Sykes for two years and customarily drove the truck while hauling freight at Sykes' direction. Sykes and Murray had a disagreement and, after a point, Murray did no more hauling on direct orders from Sykes. The tractor continued to display Sykes' sign, however, and Murray hauled loads for other certified carriers, under trip leases, which were permitted under the lease and governing regulations. The Court found that all trip leases had terminated at the time of the accident. There was disputed evidence as to Sykes' efforts to terminate its lease and to reclaim its licenses and signs. The Court found that there was a jury issue as to whether the lease was still in effect, so that Murray would be operating under Sykes' authority.

The Court also found, in *Brannaker*, a jury issue as to whether Murray, at the time of the accident, was engaged in Sykes' business, or was engaged in a purely personal mission in returning to his home. We held that the maximum effect of ICC regulations would be to make the certified carrier liable as owner, and that the owner would not be responsible for the employee's use of the vehicle in a purely personal mission. This holding is more restrictive of liability than some courts would decree.[14] But this part of the opinion is not pertinent, in the view

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[14] *Schedler v. Rowley Interstate Transportation Co.*, 68 Ill.2d 7, 11 Ill.Dec. 541, 368 N.E.2d 1287 (1977) (carrier was held vicariously liable to the plaintiff for injuries sustained after the trailer had been dropped off at carrier's terminal and the lessor of the tractor was driving it to his home); *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579 (N.J.1969), *cert. denied*, 395 U.S. 935, 89 S.Ct. 1999, 23 L.Ed.2d 450 (1969) (carrier was held liable for an accident involving a leased tractor, bearing its decals, while used by the driver for personal transportation).

we take of the case, because here the evidence shows beyond dispute that the unit was hauling regulated dry freight at the time of the accident.

[9] P.I.E. argues that it has only trip leases for rolling stock it does not own and that any trip lease for the 1978 Kenworth expired when the cargo reached its distination. Trip leases are valid under the governing statute and regulations only in isolated situations, one of which involves back hauling after transporting a load of produce, which enjoys an agricultural exemption.[15] Other leases of rolling stock by a certified carrier must be for a minimum 30-day period. The plaintiffs argue that it must be assumed that there was a minimum 30-day lease which had not expired because P.I.E. did not meet the burden of showing that there was a valid trip lease. In the view we take of the case we do not have to resolve their conflicting positions bur rather assume, for purposes of this opinion, that the last journey of the 1978 Kenworth under P.I.E.'s authority was covered by a valid trip lease.

[10] The signs or placards are essential parts of any lease of rolling stock by a certified carrier. They must show the lessee carrier's name and operating number, and must be serially numbered in the carrier's own series.[16] The regulation[17] provides that, at the termination of the trip,

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[15] Section 1057.4(a)(3)(i)(B) permits the use of a trip lease when a truck is engaged in the carriage of agricultural commodities exempt under 49 U.S.C. 303(b)(6).

> (b) Where the motor vehicle so to be used in one which has completed a movement covered by section 203(b)(6) of the Act and such motor vehicle is next to be used by the motor carrier in a loaded movement in any direction, and/or in one or more of a series of movements, loaded or empty, in the general direction of the general area in which such motor vehicle is based;

[16] 49 C.F.R. § 1057.4(d) (1978).

[17] 49 C.F.R. § 1057.4(d)(1) (1978).

> The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment.

P.I.E., of course, offered no evidence of any attempt to retrieve the signs, because it disclaimed knowledge of any dealing with Tabor or his associates. *Brannaker* suggests that evidence of such efforts, or of reporting the loss of serially numbered signs to appropriate authorities, would be significant in support of the carrier's theory that the lease had terminated. *See also Atlantic Truck Lines, Inc. v. Kersey,* 387 So.2d 411 (Fla.App.1980). P.I.E. was operating at a distinct disadvantage in trial after the jury found that there had been a lease of the 1978 Kenworth to it, but we must proceed on the assumption that the signs were furnished and never returned, and that no effort was made to reclaim them.

P.I.E., citing *Brannaker,* argues that the bare existence of a lease and the failure to reclaim the signs following termination is not sufficient to found liability, in the absence of a finding that Brown was operating the truck "within the scope and course of employment by an agency of P.I.E." Judge Flanagan of the Court of Appeals adopted this position. *Brannaker* does support the proposition that the mere presence on a vehicle of a placard furnished by a carrier is not conclusive of the carrier's vicarious liability, but it involves two factual possibilities not here present, as follows: (1) the carrier may have made reasonable efforts to terminate the lease and to reclaim its identifying signs; or (2) the vehicle may have been used on a mission personal to the driver, not involving the hauling of freight for the benefit of the lessee carrier or anyone else, at the time of the accident. There is no basis in the evidence in this case for consideration of either of these theories, or any similar theories.

Brannaker emphasizes the great importance of the sign in giving an appearance of operating authority, and other courts have

emphasized this circumstance.[10] In *Mellon National Bank & Truck Co. v. Sophie Lines,* 289 F.2d 473 (3d Cir.1961), frequently cited, a carrier leased a truck from an owner-driver and furnished signs. When the lease was still in effect, the truck, displaying the carrier's signs, was used for an illegal back haul of lumber in which the carrier had no interest. The court found the carrier liable, nonetheless, observing that the presence of the signs made it appear that the shipment was moving under its certificate. That case is similar to this one, but is not completely in point because there a continuing lease was in effect and the parties contemplated shipments by the lessee's order at the conclusion of the illegal back haul.

A very recent case discussing the importance of the signs and consistent with the result we reach is *Rodriguez v. Ager,* 705 F.2d 1229 (10th Cir. 1983). Judge Doyle's comprehensive opinion discusses the purpose of the regulatory scheme and analyzes the leading cases.

[11] We conclude that the instruction here given properly stated the essential disputed elements of the case and was supported by the evidence. P.I.E. could probably have obtained the signs easily by holding up payment until they were returned. By allowing the trucker to retain the signs, it contributed to the appearance that the unit was operating under P.I.E.'s authority. There is no evidence that Marlo thought that it was arranging a shipment under that authority, or that it dealt with Brown or Singleton because they were apparently able to palm themselves off as having authority from P.I.E., but it is quite possible that

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[10] *See, e.g., Wellman v. Liberty Mutual Insurance Co.,* 496 F.2d 131 (8th Cir.1974); *Mellon National Bank & Trust Co. v. Sophie Lines, Inc.,* 289 F.2d 473 (3rd Cir.1961); *Cosmopolitan Mutual Insurance Co. v. White,* 336 F.Supp. 92 (D.Del.1972); *Kreider Truck Service, Inc. v. Augustine,* 76 Ill.2d 535, 31 Ill.Dec. 802, 394 N.E.2d 1179 (1979); *Cox v. Bond Transportation, Inc.,* 53 N.J. 186, 249 A.2d 579 (1969); *Leotta v. Plessinger,* 8 N.Y.2d 449, 209 N.Y. S.2d 304, 171 N.E.2d 454 (1960); *Bankers & Shippers Insurance Co. v. New York v. Watson,* 216 Va. 807, 224 S.E.2d 312 (Va.1976).

a truck with unauthorized signs might be able to attract freight business which would not otherwise fall to it. Singleton's testimony made it very clear, furthermore, that he considered the sign useful in making it easier to navigate without interference from the constabulary. It may be assumed that checks for the presence of operating authority are made by responsible officials and that signs may be of substantial assistance in avoiding arrest or challenge. Viewed in this light, the requirements of retrieval of a sign has great substantive importance in the regulatory scheme. It is more likely that freight will be carried by certified, responsible carriers if their signs are controlled.

[12-15] We conclude that P.I.E. may be held liable for the truck driver's negligence, without regard to the continuing force of the lease, if the jury finds: (1) that a sign or identifying legend was furnished by the carrier in connection with a lease; (2) that the sign was on the truck at the time of the accident; and (3) that the truck was hauling regulated freight at the time of the accident.[19] Instruction # 7 submitted the first two elements and the jury necessarily found these in reaching its verdict. The instruction might be found deficient, in a vacuum, by not requiring a finding that the truck was hauling regulated freight at the time but, if there is indeed any genuine issue of fact in this matter, it was effectively resolved by the jury's finding that the unit was being operated in Marlo's interest. Only issues of fact which are

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[19] We do not have to determine whether this element could be satisfied by showing that the unit was being operated in some other way which would facilitate the movement of non-exempt freight, nor do we have to deal with a situation such as was present in *Brannaker* or in *Rodriguez v. Ager, supra,* in which there was evidence of a lease still in effect.

genuinely in dispute need be submitted to a jury.[20] All instructions must be read together.[21]

The conclusion we reach is based on statutory policy rather than a conventional respondeat superior theory. It is based on the failure to comply with an explicit provision of the governing regulations, designed to identify the responsible carrier and to inhibit the shipment of hot freight, rather than on a holding that the lastest lease was not properly terminated. No issue is presented as to the effect of an attempt by P.I.E. to retrieve the signs, as no such attempt was shown by evidence. We of course express no opinion on the effect of failure to comply with the governing regulation in other respects. Nor do we have to decide what P.I.E.'s liability would have been had the truck been operating under lease to another certified carrier at the time of the accident. Our holding centers on the appearance of authority created and maintained when a sign is issued and not retrieved. It was not necessary, then, for the plaintiff to show that the truck was on an actual mission for P.I.E. at the time of the accident. *Rodriguez v. Ager, supra.* P.I.E.'s liability is based on appearances, not on actualities. It is clear that the unit was hauling freight for Franklin, and so the "personal mission" facet of *Brannaker* has no application.

RENDELEN, C.J., and GUNN and BILLINGS, JJ., concur.

HIGGINS, J., concurs in part and dissents in part in separate opinion filed.

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[20] *See, Douglas v. Farrow,* 334 S.W.2d 234 (Mo.1960); *Brenham v. McCoy,* 213 S.W.2d 914 (Mo.1948); *Ryan v. Burrow,* 326 Mo. 896, 33 S.W.2d 928 (1930); *Whiteaker v. Chicago, R.I. & P.R. Co.,* 252 Mo. 438, 160 S.W. 1009 (1913), aff'd in, 239 U.S. 421, 36 S.Ct. 152, 60 L.Ed. 360 (1915).

[21] *See, Smith v. American Bank & Trust Co.,* 639 S.W.2d 169 (Mo.App.1982); *Goodwin v. S.J. Groves & Sons Co.,* 535 S.W.2d 577 (Mo.App.1975).

DONNELLY, J., dissents in separate opinion filed.

WELLIVER, J., dissents in separate opinion filed and concurs in separate dissenting opinion of DONNELLY, J.

WELLIVER, J., withdraws previously filed dissent and files substitute dissenting opinion and concurs in separate dissenting opinion of DONNELLY, J., on December 20, 1983.

HIGGINS, Judge, concurring in part and dissenting in part.

I concur in the opinion insofar as it affirms plaintiffs' judgment against Marlo Transport Corporation.

I cannot join the opinion in its affirmance of plaintiffs' judgment against Pacific Intermountain Express Company because I cannot find any evidence to show defendant vicariously liable to the plaintiffs.

The majority opinion concedes there is no evidence that the fatal trip was carried on under P.I.E.'s authority or its knowledge or that it had any interest in the revenues connected to the trip.

The case against P.I.E. was submitted on a theory that failure of P.I.E. to remove an identifying sign covering a previous bona fide lease somehow provided the evidence of vicarious liability otherwise lacking. It is undisputed that there was no lease or other enterprise arrangement existing between P.I.E. and Tabor to provide a right of control on the trip in question as a basis for vicarious liability.

In these circumstances, plaintiffs failed to make a submissible case against P.I.E. and the judgment against it should be reversed.

DONNELLY, Judge, dissenting.

Today, the Court ignores settled Missouri law and implants, again without a rationale, a scheme for redistribution of property. *See Virginia D. v. Madesco Investment Corp.*, 648 S.W.2d 881 (Mo. banc 1983).

The principal opinion holds P.I.E. vicariously liable on the basis of a regulation adopted by the Interstate Commerce Commission and governing leases of rolling stock by a certified carrier. In so doing, it imposes a liability on P.I.E. when using leased equipment greater than its liability when operating its own equipment. I cannot agree.

The essential questions in this case are (1) whether P.I.E. is vicariously liable under the Missouri doctrine of joint enterprise; and (2) whether Marlo is vicariously liable under the Missouri doctrine of joint enterprise.

In *Herrell v. St. Louis-San Francisco Ry. Co.*, 324 Mo. 38, 45, 23 S.W.2d 102, 105 (banc 1929), this Court declared " 'that negligence in the conduct of another will not be imputed to a party if he neither authorized such conduct, nor participated therein, nor had the right or power to control it.' " *See* Restatement (Second) of Torts § 491, Comments b & c (1965).

In my view, respondents failed to make a submissible case.

I respectfully dissent.

WELLIVER, Judge, dissenting.

I respectively dissent. The Court today strains prior conceptions of vicarious liability in order to uphold plaintiffs' judgment against defendants. Unquestionably, plaintiffs have suffered a tragic wrong, but it is apparent to me that the tortfeasor is not before the Court. While I emphathize with plaintiffs, I cannot subscribe to assessing tort "liability ... based on appearances, not on actualities." Appearances have nothing to do with who caused or may have been responsible for plaintiffs' injuries and damages. Because I cannot justify holding parties so remotely related to a negligent act responsible, I would reverse the judgment rendered against both Pacific Intermountain Express (P.I.E.) and Marlo Transport Corp. (Marlo).

The Court defends the judgment against P.I.E. on the basis of a contrived agency relationship imposed by the Court as a

matter of policy, theoretically to promote the objectives of a federal regulatory scheme. We previously have interpreted the Interstate Commerce Commission (I.C.C.) regulations relied on in this case as imposing no greater degree of liability "than the carrier's liability for the negligence of its driver when operating its own equipment." *Brannaker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524, 529 (Mo.1968). It is apparent that, despite its claims to the contrary, the majority has rejected the teaching of *Brannaker* and in its stead, has embraced a view that the court defined policy objectives underlying the regulatory scheme warrant imposing something resembling strict liability for trucking carriers.

I believe the majority's decision is neither supported by the law of this state nor justifiable as a matter of policy. I believe we are compelled to look to the law of this state when determining whether P.I.E. is liable for the truck driver's negligence. Our federal Constitution leaves to the control of state authorities the regulation of civil relationships of the type encompassed by the law of agency. Because of the absence of any state legislation modifying the truck driver involved in the accident, this Court should utilize this state's common law of agency. It is clear that under the doctrine of respondeat superior this defendant could not be found liable.

The majority tacitly concedes this fact, but nevertheless affirms the judgment against P.I.E. for policy reasons. I do not believe it is desirable to hold interstate trucking carriers, such as P.I.E., liable under the circumstances of this case. The imposition of liability because of the presence of a placard on the truck will not encourage carrier-lessees to lease equipment from safer operators. Rather, it will lead only to stricter control of identification placards. This is not a valid reason for abandoning this state's long established rules of agency.

The Court's decision with respect to Marlo is equally tenuous. We previously have described a joint venture as an "association of persons to carry out a single business enterprise

for profit, for which purpose they combine their property, money, effects, skill, and knowledge." *Bell v. Green,* 423 S.W.2d 724, 731 (Mo. banc 1968), quoting 48 C.J.S. *Joint Adventures* la. *Bell* further provides that "[a]s a general rule, in order to constitute a joint adventure, there must be a community of interest in the accomplishment of a common purpose, a mutual right of control, a right to share in the profits and a duty to share in the losses as may be sustained." 423 S.W.2d at 731. *See also Howard v. Winebrenner,* 499 S.W.2d 389, 396 (Mo.1973). I do not believe the evidence in the record supports the majority's conclusion that Marlo was participating in a joint venture as our prior decisions have defined that term.

In analyzing Marlo's culpability, it is necessary to understand the nature of its business. As a "freight broker," Marlo assisted in locating available truckers for companies needing materials shipped. In return for a percentage of the shopping fee, Marlo placed truckers in contact with its clients. Under this arrangement, Marlo earned its fee upon obtaining a truck to haul the freight. While Marlo may have had a commercial interest in seeing its client's freight delivered, it had no legal interest at stake with respect to the fee once the trucker agreed to haul freight. Because Marlo's aprticipation in the transaction ended at this point, the Court errs when it finds that "[t]he parties undertook a particular project, for mutual benefit and profit." 662 S.W.2d at 241.

Nor do I see any basis whatsoever for the finding that Marlo had an "equal right of control." *Id.* at 241. There is positively no evidence in the record to support a conclusion that Marlo, through the exercise of reasonable care, could have controlled the operation of the truck. On the contrary, the degree of autonomy with which the driver of the truck in this case chose his route convinces me that he acted as an independent contractor. The Court notes that "[t]his is not a situation in which Marlo should be allowed to escape liability by asserting independent contractor status," 662 S.W.2d at 242, citing Marlo's deal-

ings with a trucker operating without proper I.C.C. registration. If the Court truly intends to assess tort liability on the basis of "appearances, not on actualities," then I believe it is somewhat incongruous to state on the one hand that a truck bearing P.I.E.'s placard was thereby leased to P.I.E. at the time of the accident but that, on the other hand, the same truck bearing the same placard lacked I.C.C. certification at the time of Marlo's involvement with it.

The result reached by the majority cannot be viewed as other than basing liability for damages on the depth of the defendant's pocket without regard to the degree of defendant's fault.

I also concur in the dissent of DONNELLY, J.

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
DIVISION ONE

No. 12749 and 12760
(Consolidated)

Cathy Jean Johnson, and Thomas Ray Boatz Johnson and Rebecca Joyce Johnson by their next friend Jean Johnson,

Respondents,

vs.

Pacific Intermountain Express Co., and
Marlo Transport Corporation,

Appellants.

Appeal from the Circuit Court of Dallas County, Missouri
Honorable Charles V. Barker, Judge

AFFIRMED

CROW, J. Pacific Intermountain Express Co. ("Pacific") and Marlo Transport Corporation ("Marlo") appeal[1] from a $750,000 judgment in an action for the wrongful death of Thomas Arthur Johnson ("Johnson"). § 537.080, RSMo 1978. Johnson was killed November 19, 1978, when a 1970 Chevrolet "Blazer" he was driving north on highway 65 in Dallas County was struck in the northbound lane by a southbound 1978 Kenworth tractor driven by Lee Brown, Jr. ("Brown"). The tractor was pulling a trailer carrying 45,402 pounds of "steel coil" from "Franklin Stainless Corporation" of Port Washington, New York, to "T. P. Metal Stamping" of Broken Arrow, Oklahoma. Respondents (plaintiffs below) are Johnson's surviving spouse ("Cathy"), minor son and minor daughter.

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[1] Pacific is appellant in number 12760, Marlo in 12749.

Brown's negligence is undisputed, and there is no contention that Johnson was contributorily negligent.[2]

Appellants were held vicariously liable for Brown's negligence in the trial court. They contend they are not liable, and that the trial court erred in denying their respective motions for directed verdict. Additionally, Pacific contends there is error in the verdict directing instruction against it, and both appellants assert the trial court erred in excluding evidence of Cathy's "remarriage."

We review the evidence in the light most favorable to respondents, giving them the benefit of all favorable inferences, and disregarding appellants' evidence unless it aids respondents. Beck v. Modern American Life Insurance Co., 589 S.W.2d 98 at 101 [2], (Mo.App. 1979).

In 1977, Dortha Bill Singleton ("Singleton"), an "over the road truck driver," got acquainted with Roland Healer Tabor ("Tabor") in St. Louis, Missouri. Singleton soon began driving a tractor owned by Tabor, hauling freight for various carriers who had "ICC authority." Two were "Riss International" and "Kirby Transportation." Tabor leased his tractor to the carriers, and the freight was hauled under the carriers' "permits." Neither Tabor nor Singleton had "ICC authority."

In 1978, Tabor obtained the 1978 Kenworth from "Equilease" and hired Brown as an additional driver.[3] The 1978 Kenworth, unlike Tabor's first tractor, was not leased "permanently" to a carrier with "ICC authority."

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[2] The cause was tried to a jury and neither appellant tendered an instruction on contributory negligence.

[3] There was a conflict in testimony about the arrangement between Tabor and his drivers. Singleton said he received a salary from Tabor. Tabor said he "leased" the tractors to his drivers for a percentage of the earnings from the hauls. The conflict does not affect the issues before us.

Singleton drove the 1978 Kenworth on its first haul, carrying "produce" from the west coast to the east coast. According to Singleton, no "ICC permit" was required to carry that cargo.

Upon completing the trip, Singleton began "looking for a load to go back to the west coast." A truck driver in "Jersey City" gave Singleton a phone number of a "guy" who had westbound freight. Singleton phoned, reaching a man whom Singleton remembered as "Ray Dean." Dean identified himself as a Pacific agent and described the freight, telling Singleton where to pick it up and what the pay would be. Singleton "agreed to take the load."

Singleton picked up the cargo, obtaining a "bill" from the "people" at the "loading place." Singleton took the "bill" to Dean's office, where Singleton saw "signs" indicating it was a Pacific office. Dean gave Singleton a check for several hundred dollars as an "advance," and "cut a lease" which Singleton signed. Dean gave Singleton a copy of the lease, a copy of Pacific's "authority," and "some different permits for different states." Dean also gave Singleton a Pacific "sign" to affix to the 1978 Kenworth.

Dean told Singleton that in order to get paid, Singleton should return the "papers" and "sign," either by mail or in person. According to Singleton, he delivered the freight to California, then returned the "papers" and "sign" to Dean on the next trip east, receiving "the check to give to Mr. Tabor."

Pacific is a carrier authorized by the Interstate Commerce Commission ("I.C.C.") to transport freight. Pacific has three divisions, two of which perform specialized hauling services with "trucks" owned by Pacific. The third, All States Division, is a "leasing operation." It leases "tractor-trailer equipment" from individuals and corporations, allowing the lessors to operate under Pacific's "authority." Each lease is for a "one-way trip," and is prepared on a "standard form" identifying the lessor for expenses, then pays the balance due under the lease after the consignee has receipted for the freight.

When each lease is signed, Pacific's "terminal manager or agent" supplies "signs" to the driver, to be displayed on the tractor. The signs "identify All States Trucking," and bear serial numbers which are "logged in" by Pacific. Pacific's agents are instructed to tell the driver to return the signs and other documents when the trip is completed.

Sometimes after his first haul for Pacific, Singleton was again on the east coast with the 1978 Kenworth. He executed another "trip lease" with Pacific, receiving "advance money" and a sign. Singleton made this second delivery, and subsequently returned to the east coast. He took the "bills" to Dean and was "paid off." This time Dean did not ask for the sign, and Singleton kept it, allowing it to remain attached to the 1978 Kenworth.

Thereafter, Singleton made "one or two" more trips for Dean in that vehicle, the unreturned sign still on display. Singleton's last haul for Pacific in the 1978 Kenworth was "ten or twelve days" before the fatal collision.

Three days before the collision, Singleton was at a truck stop on the east coast with Brown and the 1978 Kenworth, looking for "a load going west." A "guy" said he had one going to Oklahoma, and told Singleton "what it paid and everything." Singleton agreed to take it.

The man made a phone call, then accompanied Brown and Singleton "over in New York" where they picked up a load at "Franklin Steel." The load was the one in the trailer when the collision occurred. The weight of the "empty truck" (33,000 pounds), combined with the weight of the load, exceeded 78,000 pounds. Singleton knew this made the unit "overweight" in Missouri.[4]

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[4] § 304.180, RSMo 1978.

"A man at the steel mill" wrote "Marlo" on a "shipping order," following the word "Carrier." Brown and Singleton departed with the load and shipping order. Their next stop was Marlo's office in New Jersey. There, Singleton received a $600 "advance" check, and was told to bring the "bills" back "signed" in order to receive "the rest of the money." There was no discussion about "the ICC permit."

Singleton cashed the check at a truck stop, then headed west with Brown in the 1978 Kenworth, pulling the freight and displaying the unreturned Pacific sign.

Marlo is a "freight broker" which connects "tractor-trailer drivers with shippers who need their goods moved." Marlo owns no "trucks or equipment" and has no I.C.C. "rights for shipping." When one of Marlo's customers has goods to ship, Marlo finds a hauler by contacting drivers it "normally" uses, and by calling other brokers. Marlo also pays "lumpers"[5] to find drivers for certain destinations. Some drivers used by Marlo have their own I.C.C. "authority." Others operate under "co-op authority." Marlo's president admitted some "run without authority."

On "most occasions" shippers pay Marlo the entire amount of the transportation charge. Marlo keeps 25% and pays the remainder to the drivers. In the case here, Marlo billed Franklin Stainless Corporation $1589. How much Marlo received, and whether it was divided is unclear.[6]

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[5] According to Marlo's president, lumpers are "guys hanging around" the New Jersey Truck Center who load and unload trucks.

[6] Franklin Stainless Corporation evidently instructed T. P. Metal Stamping to pay Marlo's charges. T. P. Metal Stamping made a "claim" for $750, presumably for cargo damaged in the collision. Marlo's president did not know who completed the delivery after the collision, nor did he find a record of payment to Brown or Singleton.

Singleton knew he and Brown had no "permits or authority" to carry the steel coil from New York to Oklahoma. In Singleton's words, they were "hauling hot freight." Singleton knew they would get a "ticket" if stopped. Displaying the unreturned Pacific sign on the 1978 Kenworth was an "advantage" according to Singleton, because "all the policemens (sic) and highway patrolmens (sic) knew about P.I.E. and you're not gonna get stopped going down the road with a little P.I.E. sign on the side of your truck because they're one of the largest companies in this country."[7] Singleton's primary concern was avoiding weight scales. If he could, he had a "good chance" to make the delivery "without getting a citation."

Brown and Singleton reached St. Louis the afternoon of November 17, 1978. After spending the night, they departed at "6:00 or 7:00" the next evening. They planned a route through Missouri to "miss the scales." Tragically for Johnson, the route included highway 65 between highway 54 and Interstate 44.

After a two hour pause at a truck stop in O'Fallon, and sleeping "part of the night" at a truck stop "in the Ozarks," Brown and Singleton reached the collision site about 10:10 a.m. Singleton had been asleep "back in the bed" until minutes before the impact.

Pacific's sign was on the 1978 Kenworth when the collision occurred.[8]

Respondents' theory of liability against Pacific is different than their theory against Marlo.

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[7] At trial, Pacific was referred to as "P.I.E."

[8] According to one witness, part of the sign was "tore off." From what remained, the witness copied: "States Trucking. Division of P.I.E., Oakland, California, ICC No. MC-730." Pacific's I.C.C. permit number is MC-730.

Respondents' theory against Pacific is that Pacific is vicariously liable for Brown's negligence if (a) Pacific leased the tractor driven by Brown and provided the sign to be displayed on the tractor identifying Pacific as the carrier, and (b) Pacific failed to remove the sign from the tractor before the collision.[9] The theory is based on I.C.C. regulation 1057.4 ("the regulation") which, at the time of the collision, imposed certain obligations on I.C.C.-authorized carriers using equipment leased from others.[10]

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[9] Instruction No. 7, tendered by respondents and given by the trial court, states:

> "Your verdict must be for plaintiffs Cathy Johnson, Thomas R. Johnson, and Rebecca Johnson and against defendant Pacific Intermountain Express Company if you believe:
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> First, Cathy Johnson is the surviving spouse of Thomas A. Johnson and Thomas R. Johnson and Rebecca Johnson are the children of Thomas A. Johnson, and
>
> Second, Pacific Intermountain Express Company leased the truck driven by Lee Brown, Jr. and provided a sign to be displayed on the truck identifying Pacific Intermountain Express Company as the carrier, and
>
> Third, Pacific Intermountain Express Company failed to remove the sign from the truck before the collision of November 19, 1978, and
>
> Fourth, the truck driven by Lee Brown, Jr. was on the wrong side of the road, and
>
> Fifth, Lee Brown, Jr. was thereby negligent, and
>
> Sixth, such negligence either directly caused Thomas A. Johnson's death or combined with the acts of Ralph Nevelle Jenkins to directly cause Thomas A. Johnson's death."

[Jenkins was the driver of a vehicle struck by the 1978 Kenworth just before it hit Johnson's vehicle.]

[10] On November 19, 1978, the parts of I.C.C. regulation 1057.4 (49 C.F.R. § 1057.4) pertinent to this case stated:

"Other than equipment exchanged between motor common carriers in interchange service as defined in § 1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) *Contract requirements.* The contract, lease, or other arrangement for the use of such equipment:

. . . .

(2) *Written contract required.* Shall be in writing and signed by the parties thereto, or their regular employees or agents duly authorized to act for them in the execution of contracts, leases, or other arrangements.

(3) *Minimum duration of 30 days when operated by lesor.* Shall specify the period for which it applies, which shall be not less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employee of the owner; excepting:

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(4) *Exclusive possession and responsibilities.* Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement, except:

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(7) *Copies of lease and their distribution; copy to be carried on vehicle.* Shall be executed in triplicate; the original shall be retained by the authorized carrier

in whose service the equipment is to be operated, one copy shall be retained by the owner of the equipment, one coy shall be carried on the equipment specified therein during the entire period of the contract, lease, or other arrangement, unless a certificate as provided in paragraph (d)(2) of this section is carried in lieu thereof.

(b) *Receipts for equipment to be specific.* When possession of the equipment is taken by the authorized carrier or its regular employee or agent duly authorized to act for it, said carrier, employee or agent shall give to the owner of the equipment, or the owner's employee or agent a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is taken; and when the possession by the authorized carrier ends; it or its employee or agent shall obtain from the owner of the equipment, or its regular employee or agent duly authorized to act for it, a receipt specifically identifying the equipment and stating therein the date and the time of day possession thereof is taken.

. . . .

(d) *Identification of equipment as that of the authorized carrier.* The authorized carrier acquiring the use of equipment under this rule shall properly and correctly identify such equipment during the period of the lease, contract, or other arrangement in accordance with the Commission's requirements in Part 1058 of this chapter (Identification of Vehicles). If a removable device is used to identify the acquiring authorized carrier as the operating carrier, such device shall be on durable material such as wood, plastic, or metal, and bear a serial number in the acquiring authorized carrier's own series so as to keep proper record of each of the identification devices in use.

(1) *Identification to be removed when lease terminated.* The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment."

The regulation required, *inter alia,* a written contract[11] specifying the period of the lease, which could not be less than 30 days.[12] The regulation also required the carrier to "properly and correctly" identify the equipment during the lease period.[13] Removable devices were allowed for identification purposes, so long as they were on "durable material" and bore "a serial number in the acquiring authorized carrier's own series" to enable the carrier to keep a record of each of the identification devices in use.[14] The regulation further provided that when the lease ended, the lessee was to remove any legend showing it as the operating carrier before relinquishing possession of the equipment to the lessor.[15] Additionally, the lessee was to obtain a receipt from the lessor showing the time and date the equipment was returned to the lessor.[16]

The history and purpose of the regulation appear in other cases and need not be repeated. See American Trucking Associaitons, Inc. v. United States, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337 (1953); Duke v. Thomas, 343 S.W.2d 656 (Mo.App. 1961); Cox v. Bond Transportation, Inc., 53 N.J. 186, 249 A.2d 579 (1969). We need only note, as did the Supreme Court of Missouri in Brannaker v. Transamerican Freight Lines, Inc., 428 S.W.2d 524 at 528 (Mo. 1968), that after enactment of the first Motor Carrier Act in 1935 by the Congress of the United States,[17] one of the principal abuses that

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[11] 49 C.F.R. § 1057.4(a)(2), footnote 10, supra.

[12] 49 C.F.R. § 1057.4(a)(3), footnote 10, supra.

[13] 49 C.F.R. § 1057.4(d), footnote 10, supra.

[14] Id.

[15] 49 C.F.R. § 1057.4(d)(1), footnote 10, supra.

[16] 49 C.F.R. § 1057.4(b), footnote 10, supra.

[17] Ch. 498, 49 Stat. 543.

developed was the practice whereby I.C.C.-authorized motor carriers leased equipment from others and engaged the owners or someone for the owners to operate the equipment as independent contractors to transport cargo for the authorized carriers. The leases were usually for a single trip or short duration, and the independent contractors were often unreliable.

These practices, according to the Supreme Court of Illinois in Kreider Truck Service, Inc. v. Augustine, 76 Ill.2d 535, 394 N.E.2d 1179 at 1181 (1979), made it difficult to determine who had control or possession of a truck at any given time for the purpose of determining liability for injury and damages arising from accidents.

The resulting economic abuses and legal problems prompted legislation and regulations designed to prevent authorized motor carriers from delegating the performance of their franchise duties to independent contractors and from engaging in ruinous competition and evading their public responsibilities. Brannaker v. Transamerican Freight Lines, Inc., supra, 428 S.W.2d at 528. This is the background of the regulation on which respondents rely.

Pacific's contention that its motion for directed verdict was erroneously denied is two fold.

First, Pacific asserts there was no evidence that the 1978 Kenworth was leased to Pacific when the collision occurred. Specifically, Pacific says respondents failed to prove Pacific ever leased the vehicle. (Pacific does not contend a lease existed but terminated before the collision, thus we need not—and do not—consider that possibility.)

In asserting there was no evidence that Pacific leased the 1978 Kenworth, Pacific argues that (a) the regulation requires a written lease, and respondents produced no written lease at trial, and (b) Pacific presented evidence that it had no record of any lease with Tabor, Brown, Singleton or Marlo, and no record of an employee named Ray Dean.

The argument is inapposite. Singleton testified he executed written leases for the 1978 Kenworth with Pacific at Dean's office, the last lease occurring 10 or 12 days before the collision. Tabor testified he saw Pacific signs on the 1978 Kenworth, and that he received Pacific checks from a "guy" in New Jersey. The evidence was sufficient to support a finding that Pacific leased the 1978 Kenworth, and the jury so found. We do not weigh the evidence. Diversified Metals Corporation v. Aaron Derer & Sons, Inc., 498 S.W.2d 783 at 785 [2], (Mo. 1973). Pacific's first attack is without merit.

Pacific's second attack is that even if it did lease the 1978 Kenworth, there was no evidence that Brown was operating it "in the scope and course of any agency or employment" of Pacific when the collision occurred.

It is, of course, true that Brown was not hauling freight for Pacific, or even returning from a haul for Pacific, when the collision occurred. Respondents do not contend otherwise. Respondents assert, however, that Pacific, having leased the 1978 Kenworth, was liable for Brown's negligence until Pacific complied with the requirements of the regulation for terminating the lease, i.e., removing the Pacific sign and obtaining a receipt from Singleton or Brown showing that Pacific had relinguished possession.

If Missouri law is as respondents contend, Pacific is vicariously liable for Brown's negligence in hauling freight for hire so long as the lease remains in effect, and Pacific's argument about "scope and course of agency or employment" begs the question. If, on the other hand, Missouri law requires respondents to prove not only that the lease was in effect, but also that Brown was acting in the scope of his employment by Pacific and advancing Pacific's business interest when the collision occurred, Pacific, on the record here, is not vicariously liable for Brown's negligence. Thus, respondents' theory of liablity against Pacific, and Pacific's second attack on the trial court's denial of Pacific's motion for directed verdict, present a question of law.

The question, in a slightly different setting, was before the Supreme Court of Missouri in Brannaker v. Transamerican Freight Lines, Inc., supra, the principal case on which Pacific relies. There, one Murray leased his tractor to Sykes Transport Company, an I.C.C.-certificated carrier. Murray drove his tractor (bearing Sykes' name) pulling Sykes' trailer, and hauling under Sykes' authority. Eventually a disagreement occurred and Murray returned Sykes' trailer, and did no further hauling under Sykes' direction. However, Murray retained Sykes' license plates (which Murray had paid for) and continued to display Sykes' name on the tractor. Sykes tried to obtain the licenses from Murray, but did not persist in that effort, nor did Sykes notify any regulatory agency that the lease was cancelled. Moreover, Sykes did not attempt to have its name removed from Murray's tractor, or to obtain a receipt from Murray evidencing return of the tractor to Murray's possession. Murray made a lease with Riggs Dairy Express Company to haul a cargo from Missouri to Massachusetts. After making that delivery, Murray made a lease with Transamerican Freight Lines, Inc., for a return trip, hauling a cargo from Connecticut to Indiana. The freight on both hauls was carried in a trailer belonging to Murray's brother. After the Indiana delivery, Murray returned to St. Louis and stayed several hours, then decided to go to his home in Flat River. En route, Murray drove the tractor negligently, injuring the plaintiff.

A jury found for the plaintiff and against Murray, Sykes, Riggs and Transamerican, and the trial court entered judgment accordingly. The Supreme Court of Missouri held that Riggs and Transamerican were justified in dealing with Murray on the assumption that the Sykes lease was still in effect. 428 S.W.2d at 532 [5]. So long as the tractor was leased to Sykes, I.C.C. regulations allowed other certified carriers to enter into trip leases, the liability of those carriers terminating at trip's end. The Supreme Court held the trial court erred in refusing to direct a verdict in favor of Riggs and Transamerican. 428 S.W.2d at 533 [10].

Sykes argued, as Pacific argues here, that no case was made against it because there was no substantial evidence that Murray was acting in the scope of his employment by Sykes or serving Sykes' business interest when the plaintiff was hurt. The plaintiff countered by arguing that Murray was serving Sykes' business interest because Murray was returning to his "home base," and that Sykes' vicarious liability was established as a matter of law. 428 S.W.2d at 533-534.

The Supreme Court held Sykes acqured a leasehold interest in the tractor during the existence of the lease, and that the lease created a master and servant relationship between Sykes and Murray governed by the Motor Carrier Act and I.C.C. regulations. The legal effect of the lease was that Sykes became liable for the negligence of Murray to the same extent Sykes was responsible for the negligence of one of its own drivers when operating its own equipment. 428 S.W.2d at 534 [11]. The Supreme Court added that the mere existence of the master-servant relationship was not sufficient to impose liability on Sykes in all circumstances for whatever torts Murray may commit, as all acts of an employee are not necessarily in the course and scope of his employment. The Supreme Court held Sykes would be liable for Murray's negligence only on application of the principle of respondeat superior and proof that Murray was an employee and acting in the scope of his employment at the time of the plaintiff's injury. 428 S.W.2d at 534 [12, 13]. The Supreme Court held that this issue had not been submitted to the jury under proper instruction. For that reason, and because of other instructional error affecting both Sykes and Murray, the cause was remanded for a new trial as to those two. Riggs and Transamerican were discharged.

A close reading of *Brannaker* is necessary to understand the "scope of employment" issue. Of particular importance is the Supreme Court's observation that a finding by the jury that the Sykes lease had not been terminated would permit the further finding that Sykes was entitled to a contractual share of the revenue from the subleases to Riggs and Transamerican, and

that the Sykes lease was operative both before and after those hauls. The Supreme Court also noted that when the plaintiff was injured, Murray "was making or had made a return trip from an interstate movement of motor freight." The point where the return journey ended, or would end, depended on that issue was uncertain. Sykes' home office was in Ironton, some 20 miles south of Flat River. Sykes, however, had an agent in St. Louis; whether Sykes had a terminal there was disputed. Additionally, there was no evidence as to where the tractor was usually kept, and it was unclear where Murray received orders or reported for hauling assignments.

All this was crucial to the issue of whether Murray had completed his return trip from the interstate haul, and was simply going home from work when the plaintiff was injured, or whether the return trip from the interstate haul was still in progress. The Supreme Court noted that an employer ordinarily has no concern with the manner in which an employee gets to work even though the latter drives the employer's motor vehicle, and the employer is even less concerned with transporting the employee back home after work. Thus, absent evidence establishing a special interest of the employer in the trip home, the employee is not in the scope of his employment going home from work, even though he drives the employer's vehicle. 428 S.W.2d at 534 [14]. The Supreme Court noted this rule had been applied to a motor vehicle leased by a certificated carrier to augment its equipment, and which is operated by the owner-lessor. Id. As we read *Brannaker*, this was the "scope of employment" issue.

We thus interpret *Brannaker* to hold that (a) when an I.C.C.-certificated carrier leases a tractor from an owner to carry freight for the carrier under the carrier's authority, the lease remains in effect until terminated in the manner required by I.C.C. regulations; (b) there was evidence from which the jury could reasonably find that Sykes did not cancel the lease in accordance with I.C.C. regulations, and therefore Murray remained a statutory employee of Sykes when the plaintiff was in-

jured; (c) after completion of the Transamerican delivery, Sykes' right of control over Murray and his tractor became active and dominant for the return trip to Sykes' terminal point, and (d) it was for the jury to decide whether Murray was still en route to Sykes' terminal point when the plaintiff was injured, or whether the terminal point had been reached and Murray was merely on his way home. If, on retrial, the jury found the former, Sykes would be vicariously liable for Murray's negligence; if the jury found the latter, Sykes would be exonerated.

If our analysis of *Brannaker* is correct, *Brannaker* does not support Pacific's second attack on the trial court's denial of Pacific's motion for directed verdict. There is no evidence that Brown and Singleton were on their way home, or on any other personal errand, when Johnson was killed. The uncontradicted evidence is that Brown and Singleton were going through Missouri on an interstate haul from New York to Oklahoma, and the unreturned Pacific sign was displayed to prevent discovery of the "hot freight" by law enforcement authorities.

It is, of course, evident that Pacific was not likely to benefit from the haul during which Johnson was killed, and it is likewise clear that Brown and Singleton had no commitment for any future haul for Pacific. These aspects, however, are, in our opinion, immaterial to the issue of Pacific's vicarious liability. Under the regulation, the lease of a tractor to an I.C.C.-certificated carrier must—subject to certain exceptions not applicable here—provide for the exclusive possession, control and use of the tractor, by the lessee for the duration of the lease.[11] The regulation has been held to impose vicarious liability on a lessee during the term of a lease in cases where leased equipment was used by a carrier other than the lessee for hauls unrelated to the lessee's business. Wellman v. Liberty Mutual

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[11] 49 C.F.R. § 1057.4(a)(4), footnote 10, supra.

Insurance Co., 496 F.2d 131 at 136 [1], (8th Cir. 1974); Mellon National Bank & Trust Co. v. Sophie Lines, Inc., 289 F.2d 473 at 476-478 [1, 2], (3d Cir. 1961); Kreider Truck Service, Inc. v. Augustine, supra; Bankers & Shippers Insurance Co. of New York v. Watson, 224 S.E.2d 312 at 314-315 [1], (Va. 1976).

If we were to accept Pacific's argument that it should not be held vicariously liable for Brown's negligence because Pacific's business interest was not being served by the haul during which Johnson was killed, we would undermine the purpose of the regulation. Furthermore, Pacific's argument is not supported by the "scope of employment" cases it cites. Those cases, like *Brannaker,* involve the question whether the driver of the leased vehicle was (a) making or returning from a freight haul at the time of the tortious act, or (b) simply on a personal mission of his own. Sharp v. W. & W. Trucking Co., 421 S.W.2d 213 (Mo. banc 1967); Duke v. Thomas, supra; Kaplan Trucking Co. v. Lavine, 253 F.2d 254 (6th Cir. 1958); Gackstetter v. Dart Transit Co., 130 N.W.2d 326 (Minn. 1964).

We hold that respondents' theory of liability against Pacific is recognized in *Brannaker,* and that respondents had no duty to prove that the cargo being hauled by Brown and Singleton when Johnson was killed was Pacific freight, or that Pacific's business interest was being served by that haul. It was sufficient for respondents to prove that the 1978 Kenworth was leased to Pacific at the time of the fatality, that said vehicle was being used for an interstate haul when the fatality occurred, and that the fatality was caused by Brown's negligence. The trial court did not err in denying Pacific's motion for directed verdict.

We next consider Pacific's assertions of error in the verdict directing instruction against it.[9] Pacific says the instruction should have submitted the issue of whether Brown was operating the 1978 Kenworth "within the scope and course of employment or agency" of Pacific at the time of the collision.

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[9] The instruction appears in footnote 9, *supra.*

Pacific also faults the instruction because it failed to provide a definition of scope and course of employment or agency. As already observed, respondents' theory of liability against Pacific was not based on the premise that Brown and Singleton were hauling Pacific's freight or serving Pacific's business interest when Johnson was killed; respondents' theory was based on vicarious liability imposed by the regulation. If, by the phrase "scope and course of employment or agency," Pacific is referring to whether Brown and Singleton were on a personal mission of their own when Johnson was killed, that matter was not in issue. All of the evidence shows Brown and Singleton were making an interstate haul of freight using Pacific's "sign." Undisputed facts need not be submitted in jury instructions. Celatron, Inc. v. Cavic Engineering Co., 432 S.W.2d 794 at 799 [10], (Mo.App. 1968). It was unnecessary for the verdict directing instruction against Pacific to hypothesize "scope and course of employment or agency."

Pacific also says the verdict directing instruction against it failed to require a finding that the 1978 Kenworth was leased to Pacific when Johnson was killed, that the instruction is vague, permits the jury to speculate, and constitutes a "roving commission," and that the instruction submits evidentiary facts rather than ultimate issues. We find these contentions unpersuasive, and detect no such infirmities in the instruction.

We now consider the issue of vicarious liability between respondents and Marlo. Respondents' theory against Marlo is that Brown was Marlo's servant and was driving the 1978 Kenworth in the scope and course of that employment when Johnson was killed. The verdict directing instruction against Marlo submitted the master-servant issue in accordance with MAI 13.06 [1978 Revision].[20]

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[20] Missouri Approved Jury Instructions, (3d ed. 1981).

Marlo contends the trial court erred in denying its motion for directed verdict because respondents failed to prove Marlo either controlled or had the right to control Brown at the time of the collision, an element required by the verdict directing instruction and Missouri law. Skidmore v. Haggard, 110 S.W.2d 726 (Mo. 1937); Barnes v. Real Silk Hosiery Mills, 108 S.W.2d 58 (Mo. 1937). Marlo asserts Brown was an independent contractor, for whose negligence Marlo is not vicariously liable.

Neither Marlo nor respondents cite a case on the relationship between a "freight broker" (such as Marlo) and the haulers engaged by the broker to carry freight for the broker's customers. It is an unresolved issue in Missouri.

The rules for distinguishing between servants and independent contractors in Missouri are set out in Dean v. Young, 396 S.W.2d 549 (Mo. 1965); Smith v. Fine, 175 S.W.2d 761 (Mo. 1943); Skidmore v. Haggard, *supra,* and Barnes v. Real Silk Hosiery Mills, *supra.* Those cases apply the criteria in the American Law Institute Restatement of the Law of Agency.[21]

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[21] The criteria are set out in Skidmore v. Haggard, *supra,* 110 S.W.2d at 730, and are the criteria of the original Restatement, § 220:

" '(a) The extent of control which, by the agreement, the master may exercise over the details of the work;

'(b) whether or not the one employed is engaged in a distinct occupation or business;

'(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

'(d) the skill required in the particular occupation;

'(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

'(f) the length of time for which the person is employed;

'(g) the method of payment, whether by the time or by the job;

The ultimate and decisive test is whether the employer controls, or has the right to control, the person hired. Barnes v. Real Silk Hosiery Mills, *supra,* 108 S.W.2d at 61 [3].

Marlo argues that Brown and Singleton were not under its control, in that they chose their own route and drove on their own schedule. Marlo also argues it did not load the cargo or tell the drivers when it was to be delivered.[22]

Respondents argue Marlo did exercise control, in that its "representative" went with Brown and Singleton to pick up the cargo, and Brown and Singleton were given an "advance" at Marlo's office and told what to do to receive the rest of their money after making delivery.

Respondents also point to these additional master-servant indicia: arranging for freight hauls by motor vehicles was the regular business of Marlo[23]; no significant amount of special skill was required for the task assigned Brown and Singleton[24]; Brown and Singleton were to be paid by Marlo, not by the con-

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'(h) whether or not the work is a part of the regular business of the employer; and

'(i) whether or not the parties believe they are creating the relationship of master and servant.' "

Another appears in Restatement 2d, Agency (1958):

"(j) whether the principal is or is not in business."

[22] According to Singleton, he was told by a "guy at the steel mill," but not by any employee of Marlo, that the consignee expected delivery "Sunday" (the day the collision occurred).

[23] Factor (h), footnote 21, *supra.*

[24] Factor (d), footnote 21, *supra.* See Pratt v. Reed & Brown Hauling Co., 361 S.W.2d 57 at 64 (Mo.App. 1962) in which the court stated the degree of skill required in operating a dump truck is "minimal."

signor or consignee[25]; the consignor contacted Marlo, not Brown and Singleton, to get the freight shipped to Oklahoma, and Marlo issued the bill for the hauling charges, this being the manner in which Marlo customarily transacted its business.[26]

We also note, however, the following indicia of no master-servant relationship: Brown and Singleton were engaged in the distinct occupation of truck driving[27]; they supplied the vehicle to haul the freight[28]; they were employed by Marlo for only one haul,[29] and they were to be paid by the job, not by time.[30]

Viewing the facts in a light most favorable to respondents and giving them the benefit of all reasonable inferences arising from the evidence, Smoot v. Marks, 564 S.W.2d 231 at 235 [1], (Mo.App. 1978), we cannot convict the trial court of error in denying Marlo's motion for directed verdict. We hold the issue was for the jury. Benham v. McCoy, 213 S.W.2d 914 at 919 [9], (Mo. 1948). This follows the Restatement view that where there is no clear inference that a master-servant relationship exists, or does not exist, the jury determines the question under instruction by the court. Restatement 2d, Agency § 220, Comment c to Subsection (1), p. 487.

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[25] See Leidy v. Taliaferro, 260 S.W.2d 504 at 507 (Mo. 1953) in which the court noted that payment, though not essential to the existence of a master-servant relationship, is an "indicative" circumstance.

[26] Factor (j), footnote 21, *supra*.

[27] Factor (b), footnote 21, *supra*.

[28] Factor (e), footnote 21, *supra*.

[29] Factor (f), footnote 21, *supra*.

[30] Factor (g), footnote 21, *supra*.

Before leaving the area of vicarious liability, we observe that neither appellant briefed the issue of whether there can be several liability of two persons (not acting jointly) as separate masters of a single servant for the same act. McFarland v. Dixie Machinery & Equipment Co., 153 S.W.2d 67 at 69-70 [1], (Mo. 1941). We express no view on whether it would have affected the outcome. Feste v. Newman, 368 S.W.2d 713 at 714 [1], (Mo. 1963).

We now consider the "remarriage" issue. On February 28, 1981, Cathy married Samuel Lower ("Lower"). On May 1, 1981, the Circuit Court of Webster County, upon Cathy's petition, entered an "Order Reaffirming Name," declaring Cathy's name to be "Cathy Jean Johnson." Cathy and Lower were still married to each other at time of trial.

Before trial, respondents filed a motion in limine praying the court to suppress "all reference and evidence" of Cathy's marriage to Lower, all references to Cathy by the surname Lower, and all references to Lower as Cathy's husband. The trial court sustained the motion.

During voir dire of the jury panel, respondents' attorney announced the names of several people "related to" Cathy, including Lower, and asked whether any of those people were known by any member of the venire. Pacific's attorney made the same inquiry. Lower, however, was not identified as Cathy's husband. No venireman responded.

Cathy testified, giving her name as Cathy Jean Johnson. She testified she lived with her children on a rural route outside Conway, Missouri. She was not asked about her marital status, and she made no mention of Lower.

Sundry witnesses testified about "household services" Johnson performed, including appliance repair, motor vehicle maintenance, yard work and house painting. An economics professor testified about the lifetime monetary value of those services, based on Johnson's normal life expectancy. Ap-

pellants' attorneys thereupon offered to prove, by cross-examination of the professor, that the lost services could be performed by a new husband. If the professor so testified, appellants' attorneys then offered to prove Cathy and Lower were married. The offer was refused.

In an action by a widow for the death of her husband, her marriage after his death will neither (a) preclude her from maintaining the action, nor (b) affect the amount of her recovery. Katz v. North Kansas City Development Co., 14 S.W.2d 701 at 709 [11], (Mo.App. 1929); Platt v. Cape Girardeau Bell Telephone Co., 12 S.W.2d 933 at 936 [4], (Mo.App. 1929); Davis v. Springfield Hospital, 218 S.W. 696 at 700 [10], (Mo.App. 1920). However, two later cases have indicated — though not directly held — that it is improper to withhold evidence of the remarriage from the jury. In one, Duebelbeis v. Dohack, 615 S.W.2d 488 at 490-491 (Mo.App. 1981), judgment on jury verdict for defendant was reversed because of error in the introductory instruction and error in submitting contributory negligence, thus the comments about the remarriage issue were advisory only. In the other, Glick v. Allstate Insurance Co., 435 S.W.2d 17 at 23 (Mo.App. 1968), the trial court's dismissal of an action for declaratory judgment was affirmed, and the comments about the remarriage issue were dicta. Nonetheless, both cases state that withholding evidence of the remarriage is inconsistent with the integrity of the judicial process, and that the proper procedure is for the trial judge to admit the evidence and instruct the jury that the remarriage is to play no role in the jury's determination of the pecuniary advantage which would have resulted from a continuance of the life of the deceased. See Salsberry v. Archibald Plumbing & Heating Co., Inc., 587 S.W.2d 907 at 916-917 [18], (Mo.App. 1979).

Pacific asserts the trial court's ruling prevented Pacific from cross-examining respondents' witnesses regarding the "actual measure" of respondents' damages, and from cross-examining

the professor about "the basis for his opinion."[11] Pacific also says the ruling caused the jury to be misled as to Cathy's "true marital status." Marlo contends the ruling prevented it from cross-examining respondents' witnesses "as to the effect of the remarriage."

These assertions go beyond those made when the issue arose at trial. Then, as already noted, appellants offered to prove only that a new husband could perform the household services Johnson had performed, and that Cathy had a new husband, therefore the household services were not lost, "due to the remarriage." This was a bald attempt to mitigate damage by the widow's remarriage, contrary to Missouri law. Katz v. North Kansas City Development Co., *supra;* Platt v. Cape Girardeau Bell Telephone Co., *supra;* Davis v. Springfield Hospital, *supra.* The trial court properly refused the evidence on the basis offered. Even if evidence of the remarriage, alone, were admissible, evidence that services performed by Johnson could be performed by Lower in mitigation of damage was inadmissible. If several facts are included in an offer, some admissible and others inadmissible, then the whole (if properly objected to) is inadmissible; in other words, it is for the proponent to sever the good and the bad parts. Lott v. Kjar, 378 S.W.2d 480 at 484 (Mo. 1964).

Whether evidence of the remarriage, alone, might be admissible on any of the theories now advanced, or for any other reason, is not for our consideration. The offer as a whole was inadmissable for the purpose argued to the trial court, and that is the extent of our inquiry. Rule 84.13(a)[12]; Murphy v. Grisham, 625 S.W.2d 215 at 217 [6], (Mo.App. 1981).

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[11] Schaible v. Myers, 311 N.W.2d 297 (Mich. 1981).

[12] Missouri Rules of Civil Procedure.

Judgment affirmed.

John C. Crow, Judge

Greene, C.J., and Titus, J., concur.
Flanigan, P.J., concurs in result in part and dissents in part in separate opinion.

FLANIGAN, J. - (Concurring in result in part; dissenting in part.)

I concur in the result with respect to the disposition of the appeal of Marlo. With respect to the disposition of Pacific's appeal, I respectfully dissent.

In my opinion, the attack by Pacific on Instruction 7 is valid. Pacific does not challenge the adequacy of Instruction 7 insofar as it submitted the issue of driver Brown's tort liability to the plaintiffs. Pacific claims that the instruction is defective because the jury was required to return a verdict against Pacific on the basis of Brown's conduct if the jury found that Pacific leased the truck driven by Brown, provided a sign to be displayed on the truck identifying Pacific as the carrier, and failed to remove the sign before the collision. I agree with Pacific that the foregoing findings were not sufficient to impose liability on Pacific for Brown's conduct.

In a case involving the liability of a carrier-lessee of a tractor for the negligence of the owner-lessor-driver in its operation under a lease agreement under the "regulatory scheme" of the Interstate Commerce Commission, the Supreme Court of Illinois has said:

"The Supreme Court has not decided and the courts of appeals are not in agreement whether the liability of the carrier-lesser rests upon common law principles of *respondeat superior* (Wilcox v. Transamerican Freight Lines, Inc. (6th Cir. 1967), 371 F.2d 403) or liability is vicariously imposed regardless of the

use being made of the vehicle at the time of the occurrence. (See Simmons v. King (5th Cir. 1973), 478 F.2d 857; Mellon National Bank & Trust Co. v. Sophie Lines, Inc. (3d Cir. 1961), 289 F.2d 473.) We are of the opinion that it was the purpose of the regulatory scheme that the carrier-lessee be vicariously responsible to the public for the negligent operation of the leased vehicle without regard to whether at the time in question it was being used in the business of the lessee. (See Cosmopolitan Mutual Insurance Co. v. White, (D.Del. 1972), 336 F.Supp. 92.) To hold otherwise would permit injecting into each case the issues of agency, scope of employment and purpose of the movement out of which the occurrence arose, thus defeating the declared purpose of the regulations to eliminate the problem of fixing responsibility for damages and injuries to members of the public. Absent proof of compliance with sections 1057.4(d) and 1057.4(d)(1), we hold that if Dixon is liable to plaintiff, defendant must be held vicariously liable." Schedler v. Rowley Interstate Transp. Co., 368 N.E.2d 1287, 1289 (Ill. 1977).

The principal opinion in *Schedler* would support the instant ruling of my colleagues. In *Schedler* a dissenting opinion by Judge Ryan discusses the authorities relied upon by the majority of his colleagues in support of their holding and questions their supportiveness. In my opinion, however, the decision of our supreme court in Brannaker v. Transamerican Freight Lines, Inc., 428 S.W.2d 524 (Mo. 1968), supports Pacific's attack upon Instruction 7 and, of course, this court is bound by *Brannaker*.

In *Brannaker* the carrier-lessee was Sykes. At the time of the accident "the name of [Sykes] remained on the tractor, together with the numbers of the Missouri Public Service Commission and Interstate Commerce Commission certificates and permits." *Brannaker*, p. 527. Referring to the I.C.C. regulation requiring the removal, at the termination of the lease, of "devices bearing the number or numbers of the authorized carrier as the operating carrier" our supreme court held that the

regulation "does not impose liability on a motor carrier using leased equipmebt for the negligence of an owner-driver of such equipment greater than the carrier's liability for the negligence of its driver when operating its own equipment." *Brannaker,* p. 529. In making that statement our supreme court cited the *Wilcox* case which is mentioned and rejected by the Illinois Supreme Court in the quotation from *Schedler, supra.* Our supreme court also cited Gackstetter v. Dart Transit Co., 269 Minn. 146, 130 N.W.2d 326, 328[2], a case relied upon by Judge Ryan in his dissenting opinion in *Schedler.*

In *Brannaker* our supreme court held that Sykes' lease of the tractor was "still in effect" because of "Sykes' failure and neglect to erase its name and numbers from Murray's tractor, to secure the return of its license plates, and to notify the regulatory agencies and other [sic] of the cancellation of the lease." It will be observed that Sykes' acts and delinquencies with respect to the tractor were greater than, but included all of, the acts and delinquencies which, according to Instruction 7 in the case at bar, were sufficient to impose liability on Pacific.

If, as the majority opinion holds, the findings requred by Instruction 7 were sufficient to impose liability on Pacific for the acts of Brown, many portions of *Brannaker* dealing with the liability of Sykes were superfluous.

In *Brannaker,* at p. 533, our supreme court dealt with the contention of Sykes that "there was no substantial evidence that Murray was acting in the scope of his employment or serving the business interests of Sykes at the time and place of the accident ir question." There would have been no need to discuss that contention if the conduct of Sykes in permitting the I.C.C. sign to remain on the tractor which Sykes had leased from Murray was sufficient to make Sykes liable for Murray's negligence. It is, however, unnecessary to speculate on the point because at p. 534 of *Brannaker* our supreme court said: "Sykes can be held liable for Murray's negligence only on an application of the

principle of respondeat superior and the burden of proving that Murray was an employee and was acting in the scope of his employment at the time in question rests upon the plaintiff." Further, at p. 535, the supreme court said: "The plaintiff's contention that Sykes was liable for Murray's tortious conduct as a matter of law cannot be sustained."

In my opinion the findings of Instruction 7 are insufficient to support a verdict against Pacific. I disagree with the majority's statement that "it was unnecessary for [Instruction 7] to hypothesize 'scope and course of employment or agency.' "

George M. Flanigan, Judge

APPENDIX C

IN THE CIRCUIT COURT OF DALLAS COUNTY, MISSOURI

Case No. 6877

Cathy Jean Johnson, Individually, and Thomas Ray Boatz Johnson and Rebecca Joyce Johnson, by and through their next friend, Cathy Jean Johnson,

Plaintiffs,

vs.

Pacific Intermountain Express Co.; Marlo Transport Company; and Robert J. Smith as Defendant Ad Litem for Ralph Nevelle Jenkins,

Defendants.

Judgment

Now on this 4th day of February, 1982, this case having come on for trial commencing the 1st day of February, 1982, and the trial having continued from day to day from its commencement, and the jury having rendered its verdict, said verdict having been signed by jurors Bill Hale, Robert Hunget, Perry Bartee, Lynn Johnson, Betty Baldock, Emogence Loudermilk, Julia Percival, Ralph Jackson, Linus Smith, Ernest L. Beck and Kenneth Heard, and the court having examined the verdict form and found it to be proper;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

A. Judgment is entered in favor of plaintiffs Cathy Johnson, Thomas R. Johnson, and Rebecca Johnson, and against defendants Pacific Intermountain Express Company and Marlo Transport Corporation in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

B. On the claim of plaintiffs Cathy Johnson, Thomas R. Johnson, and Rebecca Johnson against Robert J. Smith, defendant ad litem for Ralph Nevelle Jenkins, judgment is entered in favor of Robert J. Smith, defendant ad litem for Ralph Nevelle Jenkins.

C. Costs are taxed against defendants Pacific Intermountain Express Company and Marlo Transport Corporation.

/s/ Illegible
Judge

APPENDIX D

The following is an order entered by the Supreme Court of Missouri on December 20, 1983:

> App. Marlo Transport Corporation's motion for rehearing overruled.
>
> App. Pacific Intermountain Express Co.'s motion for rehearing overruled.
>
> Welliver, J., withdraws previously filed dissent and files substitute dissenting opinion and concurs in separate dissenting opinion of Donnelly, J.
>
> Opinion modified on Court's own motion.

APPENDIX E

28 U.S.C. Section 1257(3)(1976) provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

APPENDIX F

49 U.S.C. Section 10526(a)(6)(B)(Supp. 1983) provides as follows:

> (a) The Interstate Commerce Commission does not have jurisdiction under this subchapter over—
>
> (6) transportation by motor vehicle of—
>
> (A) ordinary livestock;
>
> (B) agricultural or horticultural commodities (other than manufactured products thereof);

APPENDIX G

49 U.S.C. Section 11107(a)(Supp. 1983) provides as follows:

> (a) Except as provided in section 11101(c) of this title, the Interstate Commerce Commission may require a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of

this title that uses motor vehicles not owned by it to transport property under an arrangement with another party to—

(1) make the arrangement in writing signed by the parties specifying its duration and the compensation to be paid by the motor carrier;

(2) carry a copy of the arrangement in each motor vehicle to which it applies during the period the arrangement is in effect;

(3) inspect the motor vehicles and obtain liability and cargo insurance on them; and

(4) have control of and be responsible for operating those motor vehicles in compliance with requirements prescribed by the Secretary of Transportation on safety of operations and equipment, and with other applicable law as if the motor vehicles were owned by the motor carrier.

APPENDIX H

49 U.S.C. Section 11101(c)(2)(Supp. 1983) provides as follows:

(c) The Commission may not regulate the duration of, or the amount of compensation payable under, an arrangement between a motor carrier and another party to use, with a driver, a motor vehicle not owned by that carrier to transport property when—

(2) the motor vehicle to be used has completed a movement exempt under section 10526(a)(6) of this title and is next to be used by that carrier in a loaded movement in any direction or in a movement referred to in clause (1)(B) of this subsection, or both.

APPENDIX I

The pertinent provisions of 49 C.F.R. Section 1057.4 (1978) provide as follows:

> [A]uthorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:
>
> (a) **Contract requirements.** The contract, lease, or other arrangement for the use of such equipment:
>
> (1) **Parties.** Shall be made between the authorized carrier and the owner of the equipment.
>
> (2) **Written contract required.** Shall be in writing and signed by the parties thereto, or their regular employees or agents duly authorized to act for them in the execution of contracts, leases, or other arrangements.
>
> (3) Minimum duration of 30 days when operated by lessor. Shall specify the period for which it applies, which shall not be less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employee of the owner; *excepting*:
>
> (i) *equipment used in agricultural or perishable operations.—That such 30-day minimum period shall not apply to equipment, with driver . . . which is exempt under Sec. 203(b)(6) of the act, to the extent that such equipment falls within the terms of the exceptions of Sec. 204(f)(1) or (2) of the act (49 U.S.C. 304(f)), and is utilized in accordance therewith . . .*
>
> (4) **Exclusive possession and responsibilities.** Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption

of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement,....

(6) **Duration to be specific.** Shall specify the time and date or the circumstances on which the contract, lease, or other arrangement begins, and the time or the circumstances on which it ends. The duration of the contract, lease or other arrangement shall coincide with the time for the giving of receipts for the equipment as required by paragraph (b) of this section; and

....

(7) **Copies of lease and their distribution; copy to be carried on vehicle.** Shall be executed in triplicate; the original shall be retained by the authorized carrier in whose service the equipment is to be operated, one copy shall be retained by the owner of the equipment, one copy shall be carried on the equipment specified therein during the entire period of the contract, lease, or other arrangement, unless a certificate as provided in paragraph (d)(2) of this section is carried in lieu thereof.

(b) **Receipts for equipment to be specific.** When possession of the equipment is taken by the authorized carrier or its regular employee or agent duly authorized to act for it, said carrier, employee or agent shall give to the owner of the equipment, or the owner's employee or agent a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is taken; and when the possession by the authorized carrier ends; it or its employee or agent shall obtain from the owner of the equipment, or its regular employee or agent duly authorized to act for it, a receipt specifically identifying the equipment and stating therein the date and the time of day possession thereof is taken.

....

(d) **Identification of equipment as that of the authorized carrier.** The authorized carrier acquiring the use of equipment under this rule shall properly and correctly identify such equipment during the period of the lease, contract, or other arrangement in accordance with the Commission's requirements in Part 1058 of this chapter (Identification of Vehicles). If a removable device is used to identify the acquiring authorized carrier as the operating carrier, such device shall be on durable material such as wood, plastic, or metal, and bear a serial number in the acquiring authorized carrier's own series so as to keep proper record of each of the identification devices in use.

(1) **Identification to be removed when lease terminated.** The authorized carrier operating equipment under this part shall remove any legend, showing it as the operating carrier, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, before relinquishing possession of the equipment."

APPENDIX J

The following is an excerpt from respondents' voir dire examination of the jury panel in the above cause on February 1, 1982, in the Circuit Court of Dallas County, Missouri:

MR. STRONG: Mr. Heard, let me ask you this, going into this trial without having heard the ICC regulations which may not be read in evidence—depending on how the Court rules—and you haven't heard yet what the Court says the law is at the end of the case, do you have a preconceived idea that an ICC permit owner has no liability unless at the time of the collision his goods are being hauled or he is receiving money for the trip?

JUROR HEARD: You're asking me?

MR. STRONG: No, I'm sorry, well, let me talk to both of you, Mr. Heard and Mr. Hicks both. Do either one of you have any preconceived ideas that if the ICC permit owner isn't being paid or his particular goods aren't being hauled on that particular trip, that he shouldn't be held responsible and that preconceived notion is so great that you would be unable to follow the law if that happened to be contrary to that?

JUROR HICKS: I don't think it would bother me.

JUROR HEARD: No. (Tr. 41, L 14-25; Tr. 42, L 1-7).

MR. STRONG: Mr. Heard and Mr. Hicks, do you believe that you would have any trouble following a law which said that P.I.E. is responsible if it provided its ICC authority through a sign and failed to remove it before the collision occurred? (Tr. 42, L 19-23).

MR. STRONG: Have you ever heard them discuss the ICC regulations? Do you have any special information about ICC regulations and all the responsibilities that go with a person who owns an ICC authority?

JUROR STACY: They've discussed it, but probably I wouldn't retain much of that information. (Tr. 60, L 1-6).

APPENDIX K

The following are excerpts from respondents' Opening Statement and respondents' evidence in the trial of this cause in the Circuit Court of Dallas County, Missouri, on February 1, 1982:

> P.I.E. has authority from the Interstate Commerce Commission to haul the load. So P.I.E. then gives its sign to Lee Brown, Jr. Lee Brown, Jr. places that sign on his truck and then it can haul loads under P.I.E.'s authority. *The question that you will be concerned with in this case is*

P.I.E.'s liability after a particular run has been made but the sign has not yet been removed. (Tr. 6) (emphasis added).

MR. STRONG: Please the Court.

At this time we offer into evidence Section 11107, United States Code Annotated. It's titled Leased Motor Vehicles, subsection 11101 (c). (Tr. 88, L 7-10 (Mr. Strong then read 49 U.S.C. Section 11107 (Supp. 1983) to the jury in its entirety).

MR. STRONG: Now we offer in evidence from the Code of Federal Regulations section 1057.4. (Tr. 89, L 14-15) (Mr. Strong then read the pertinent provisions of 49 C.F.R. Section 1057.4 (1978) to the jury)

APPENDIX L

INSTRUCTION NO. 7

Your verdict must be for plaintiffs Cathy Johnson, Thomas R. Johnson, and Rebecca Johnson and against defendant Pacific Intermountain Express Company if you believe:

First, Cathy Johnson is the surviving spouse of Thomas A. Johnson and Thomas R. Johnson and Rebecca Johnson are the children of Thomas A. Johnson, and

Second, Pacific Intermountain Express Company leased the truck driven by Lee Brown, Jr. and provided a sign to be displayed on the truck identifying Pacific Intermountain Express Company as the carrier, and

Third, Pacific intermountain Express Company failed to remove the sign from the truck before the collision of November 19, 1978, and

Fourth, the truck driven by Lee Brown, Jr. was on the wrong side of the road, and

Fifth, Lee Brown, Jr. was thereby negligent, and

Sixth, such negligence either directly caused Thomas A. Johnson's death or combined with the acts of Ralph Nevelle Jenkins to directly cause Thomas A. Johnson's death.

M.A.I. 20.02, 17.13, 19.01, 13.06 modified
Tendered by Plaintiffs

APPENDIX M

The following is an excerpt from petitioner's Motion for New Trial in the Circuit Court of Dallas County, Missouri:

Motion For New Trial

Comes now defendant, Pacific Intermountain Express, Co., pleading in the alternative in the event that said defendant's motion for judgment notwithstanding the verdict should be overruled by this Court, and moves this Court to enter its order setting aside the verdict and judgment entered herein and granting defendant, Pacific Intermountain Express, Co., a new trial on all issues, for the following reasons:

1. The trial court erred in giving Instruction No. 7, tendered by plaintiffs, for the following reasons:....

(a) Instruction No. 7 does not submit all necessary elements of plaintiffs' case in that:....

(5) Said instruction does not submit or require a finding that Lee Brown, Jr. was acting within the scope and course of agency or employment for defendant, Pacific Intermountain Express Company.

APPENDIX N

The following are excerpts from respondents' Brief on appeal in the Missouri Court of Appeals, Southern District:

Plaintiffs' Theory Summarized

Plaintiffs' theory against P.I.E. is based upon the obligations of an authorized motor carrier which are set out in the regulations promulgated by the Interstate Commerce Commission. This theory, sometimes referred to in the cases as "franchise liability," may be summarized as follows:

> An I.C.C. authorized motor carrier who chooses to haul goods with trucks which it does not own must enter a lease whereby the carrier obtains "exclusive possession, control, and use of the equipment." The carrier assumes complete responsibility for the operation of that truck until such time as the carrier complies with the statutory requirements for terminating its responsiblity under that lease. These statury requirements include the removal of any sign or placard which was displayed upon the truck identifying the authorized carrier (Tr. 49 C.F.R. §1057.4; Tr. 89-92). Here, P.I.E. leased the truck driven by Brown, but failed to comply with the statutory requirements for terminating its responsibility before the collision occurred. Therefore, P.I.E. is liable for Brown's negligence.
>
> (Excerpt from respondents' Brief at page 19).

APPENDIX O

The following are excerpts from petitioner's Reply Brief on appeal in the Missouri Court of Appeals, Southern District:

II.

The Trial Court Erred In Overruling P.I.E.'s Motion For Directed Verdict At The Close Of All The Evidence Because P.I.E.'s Liability As A Lessee Of A Truck Involved In Interstate Commerce Could Be No Greater Than Its Liability If It Owned The Truck, And Under Missouri Law, The Liability Of An Owner Of A Truck Being Driven By Another Is Analyzed Under Traditional Common Law Agency Concepts, Which Require Proof That The Driver Was Acting Within The Scope And Course Of Employment Or Agency Of The Owner. Since, By Plaintiffs' Own Admission, There Was No Evidence That The Driver Lee Brown Was Serving The Business Interests Of P.I.E. At The Time Of The Collision, Plaintiffs Failed To Make A Submissible Case.

An issue of law has been presented to this Court concerning the scope of an I.C.C. authorized motor carrier's liability arising out of an accident involving a leased truck bearing the carrier's placards and I.C.C. permit numbers. This Court has been urged to recognize the existence of a "general rule" imposing liability on lessee-carriers solely by virtue of the presence of such placards and isignia upon the truck at the time of the accident, regardless of where the driver was going or whose business interests he was serving....

Plaintiffs ask this court to ignore *Brannaker* and hold that the I.C.C. regulations in effect impose strict liability upon an authorized carrier-lessee on any occasion when its placards and permit numbers appear upon the truck at the time of an accident. If the regulations are interpreted in this manner, the unavoidable result is that the duties, obligations and liabilities imposed by the regulatory scheme exceed the authority granted by the enabling Statute quoted above. If scope and course of employment is not relevant to the liability of a lessee-carrier under the

regulations, then the liability imposed thereby is greater than the liability of an owner-carrier in a similar situation.... (Excerpt from petitioner's Reply Brief at pages 6-7, 11).

APPENDIX P

The following are excerpts from petitioner's Application for Transfer to the Supreme Court of Missouri:

> The language of the Motor Carrier Act itself supports Pacific's position. Section 304(e)(2) of the Act grants the Interstate Commerce Commission authority to promulgate regulations for lessee-carriers which make them responsible to the same extent as if they owned the truck. 49 U.S.C. Section 304(e)(2). Nothing in the Act or the regulations purports to impose absolute liability on an *owner* of an I.C.C. authorized truck. As recognized in *Brannaker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524 (Mo. 1968) and *Wilcox v. Transamerican Freight Lines, Inc.*, 371 F.2d 403 (6th Cir. 1967), the liability of an owner of a truck for the acts of his employee is based upon the traditional common law principles of respondeat superior. Certainly, there is nothing in the Act or the regulations which purports to impose a greater scope of liability upon a lessee-carrier.
>
> (Excerpt from petitioner's Suggestions in Support of its Application for Transfer to the Supreme Court of Missouri at page 4).

APPENDIX Q

The following are excerpts from petitioner's Supplemental Brief on appeal in the Supreme Court of Missouri:

Legislative History And Regulatory Intent

> Appellants' analysis of *Brannaker* is fully consistent with the history and purpose of the Motor Carrier Act and

the ICC regulations promulgated thereunder. The strict liability theory urged by plaintiffs is not consonant with the intent of Congress.

The legislation enabling the ICC to issue the regulations upon which plaintiff's have relied explicitly states that the ICC carrier is to be treated *as if it were the owner* of the leased vehicle. 49 U.S.C.A. Section 304(e)(2), *Brannaker, supra* at 529. Further, the driver is to be treated under the legislation as an employee of the carrier, rather than an independent contractor as he would have been treated at common law.

There is nothing in the legislative history which evidences any congressional intent to expand the carrier's liability to trips totally unrelated to that carrier's business. *Appellant suggests that the statutory purpose was to ensure that the ICC carrier stood behind and accepted responsibility for any trip, including a return trip, where that carrier's cargo was involved or its business interests were being served.*

The scope of the ICC regulations relied on by plaintiffs is circumscribed by the enabling statute; the ICC can not by regulation expand upon the statutory language which explicitly states that the carrier is to be treated as if it were the owner of the leased vehicle. Moreover, there is nothing in the administrative reports of the ICC which adopted the regulations governing identification of motor vehicles and the regulations governing lease and interchange of motor vehicles which indicates that the ICC intended that a carrier would be strictly liable for accidents occuring while its placard was attached to a truck.

(Excerpt from petitioner's Supplemental Brief at pages 31-32, 33).

APPENDIX R

The following are excerpts from respondents' Brief on appeal in the Supreme Court of Missouri:

Plaintiffs' Case Summarized

Plaintiffs' case against P.I.E. is based upon the obligations of an authorized motor carrier which are set out in the regulations promulgated by the Interstate Commerce Commission. This theory, of recovery, sometimes referred to in the cases as "franchise liability," may be summarized as follows:

> An I.C.C. authorized motor carrier who chooses to haul goods with trucks which it does not own must enter a lease whereby the carrier obtains "exclusive possession, control, and use of the equipment." The carrier assumes complete responsibility for the operation of that truck until such time as the carrier complies with the statutory requirements for terminating its responsibility under that lease. These statutory requirements include the removal of any sign or placard which was displayed upon the truck identifying the authorized carrier (Tr. 49 C.F.R. §1057.4; Tr. 89-92).

Here, P.I.E. leased the truck driven by Brown, but failed to comply with the statutory requirements for terminating its responsibility before the collision occurred. Therefore, P.I.E. is liable for Brown's negligence.

(Excerpt from plaintiffs' Brief at page 14).

APPENDIX S

Pacific Intermountain Express Company's Motion For Rehearing

"If this were played upon a stage now, I should condemn it as an improbable fiction." Fabian in "The Twelfth Night," William Shakespeare, Act III, Scene 4, Line 140.

Ever since this case was filed in November, 1979, P.I.E. has felt secure in the belief that, if the facts were known, it would prevail. The evidence, it was felt, had to ultimately show that the drivers were on a classic "frolic of their own" and that P.I.E. had no part in arranging or facilitating their fateful trip. P.I.E. was equally confident that under these facts, no law, be it Federal statutes or regulations or common law vicarious liability, would impose liability upon P.I.E. without any actual responsibility for plaintiffs' damages.

How then, did this Court find the same facts relied upon by P.I.E., and yet conclude that P.I.E. is responsible for plaintiffs' $750,000 judgment? The Court has indulged in fictions, relying on "appearances" rather than "actualities" (Opinion p. 19). The Majority Opinion identifies distinctions between this case and prior Missouri case law which do not exist, and is "based on statutory policy" which is contradictory to the express language of the governing statute itself. P.I.E., therefore, moves the Court to grant a rehearing in this cause for the reason that the majority, in its opinion, has misinterpreted or overlooked material matters of law and fact, in the following respects:

I.

The Court's Recognition Of A Statutory Policy Making P.I.E. Liable For A Driver's Negligence Anytime Its Placards Remain On A Truck Is Contrary To The Express Language Of The Motor Carrier Act, 49 U.S.C. Section 304(e)(2), Which Mandates That P.I.E. Be Treated As If It Were An Owner Of The Truck.

The Majority Opinion holds that P.I.E. may be liable for the truck driver's negligence if its placard remained on the truck at the time of the accident, even if the driver was outside the scope and course of any employment at the time. The majority states that "the conclusion we reach is based upon statutory policy rather than a conventional respondeat superior theory," that being the failure to comply with the I.C.C. regulation requiring repossession of placards at the end of a lease.

P.I.E. does not deny that the regulation imposes that requirement. P.I.E. steadfastly denies that the regulatory requirement constitutes some "statutory policy" which would impose liability on P.I.E. here. The governing statute, which limits the regulatory authority of the I.C.C., expressly states that carrier-lessees shall be treated "as if they were the owners of such vehicles." 49 U.S.C. Section 304(e)(2). Indeed, the Majority Opinion recognizes this limitation in its discussion of *Brannaker v. Transamerican Freight Lines, Inc.* 428 S.W.2d 524 (Mo. 1968) by stating:

> (In *Brannaker)* we held that the maximum effect of I.C.C. regulations would be to make the certified carrier liable as owner, and that the owner would not be responsible for the employee's use of the vehicle in a purely personal mission (Majority Opinion p. 13).

The crucial question thus becomes: How would the I.C.C. treat an *owner* of a truck if its placards were on the truck at the time of an accident, but the driver was unquestionably acting outside the scope and course of his employment? *Both the respondents and the Majority Opinion have ignored the fact that the I.C.C. regulations are entirely silent on this question.* Nowhere do the I.C.C. regulations impose any form of strict liability for placards upon an *owner* of a truck. While an owner is required by the I.C.C. regulations to meet certain safety and equipment inspection requirements, there simply is no provision regarding the civil tort liability of a truck owner for its driver's negligence. That subject is left to the common law of the various states. In Missouri, the law is clear that an owner will be liable for its employee's negligence only if he is acting within the scope and course of his employment. *Chandler v. New Moon Homes, Inc.* 418 S.W.2d 130 (Mo. banc 1967).

Here the Court has unjustifiably expanded and erroneously construed the very "statutory policy" upon which its decision is supposedly based. The Majority Opinion, in fact, contradicts the express language and intent of the Motor Carrier Act, and

expands the liability of P.I.E. as a carrier-lessee beyond the scope of its liability if it were an owner of the truck.

II.

In The Alternative, P.I.E. Submits That If The Majority Opinion Has Correctly Interpreted The Intent Of The I.C.C. Regulations To Impose Liability Upon A Carrier-Lessee Without Regard To Scope And Course Of Employment, The I.C.C. Has Unlawfully Exceeded Its Delegated Authority Under The Motor Carrier Act And The Regulations Upon Which The Majority Opinion Is Based Are Void, And The I.C.C. Has Acted In Violation Of Article I, Section 1 Of The United States Constitution Which Provides That "All Legislative Powers Herein Granted Shall Be Vested In A Congress Of The United States, Which Shall Consist Of A Senate And House Of Representatives" Such That The Regulations Are Void And Ineffective.

The interpretation of the I.C.C. regulations adopted by the Majority Opinion flatly contradicts the express language of the Motor Carrier Act as set forth in Point I above. It is a fundamental principle of administrative and constitutional law that an administrative agency derives its powers by and through a specific act of the legislative branch, and that the agency may not exceed the scope of power expressly delegated to it by the legislative branch in rule making or regulation. The Majority Opinion condones a violation of these fundamental principles by the I.C.C.

Pursuant to Article I, Section 1 of the United States Constitution, any action by the I.C.C. which exceeds the scope of powers delegated to it by Congress and the Motor Carrier Act is void and ineffective. If the Majority Opinion is right as to the intent of the I.C.C. regulations, then those regulations themselves are void and a rehearing is required to properly resolve the issues of this cause under the state law of Missouri. (Excerpt from petitioner's Motion for Rehearing at pages 1-4).

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No. 83-1557

In The

Supreme Court of the United States

October Term, 1983

CATHY JEAN JOHNSON and THOMAS RAY BOATZ JOHNSON and REBECCA JOYCE JOHNSON, by their next friend, CATHY JEAN JOHNSON,

Respondents,

vs.

PACIFIC INTERMOUNTAIN EXPRESS COMPANY,

Petitioner.

On Writ Of Certiorari To The Supreme Court Of Missouri

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner Pacific Intermountain Express Company (hereinafter, P.I.E.) has inaccurately stated the question presented for review by this Court. According to Petitioner, the Supreme Court of Missouri held P.I.E. responsible for the negligent acts of the driver of the truck "after expiration of the lease" and solely because of the presence of petitioner's identifying placard on the truck. The Missouri Supreme Court's opinion clearly shows that it did *not* decide whether the I.C.C. lease to petitioner was still in force and effect at the time of the accident. The Court stated:

> "We conclude that P.I.E. may be held liable for the truck driver's negligence, *without regard to the continuing force of the lease*, if the jury finds: (1) that a sign . . . was furnished by the carrier; (2) that the sign was on the truck at the time of the accident; and (3) that the truck was hauling regulated freight. . . ." (662 S.W.2d at 245; P.I.E.'s Appendix A at A-15) (Emphasis Supplied)

The Court then held that respondents had offered sufficient evidence and properly instructed on each of these elements.

It is against this factual background that the following question should be reviewed: Does the Missouri Supreme Court's holding that P.I.E. is vicariously liable for the driver's negligence infringe upon or deny any right that is guaranteed to P.I.E. by federal law?

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A. The Constitutional Question Asserted Here By Petitioner Was First Raised In Petitioner's Motion For Rehearing In The Supreme Court Of Missouri; It Was Never Presented To The Lower State Courts And Was Not Considered Or Decided By The Missouri Supreme Court. 10

B. Petitioner's Claimed Right "To Be Treated Like An Owner" Under The Provisions Of The Motor Carrier Act Was Never Mentioned In The Trial Court, Was Asserted In The Missouri Court Of Appeals Only In Petitioner's Reply Brief, And Was Not Considered As A Determinative Factor By The Missouri Court Of Appeals Or The Missouri Supreme Court. 12

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JURISDICTION

Petitioner claims that certiorari juridiction exjsts because of the Missouri Supreme Court's interpretation of Interstate Commerce Commission regulations governing the leasing of trucks. Petitioner argues that these I.C.C. regulations as interpreted by the Missouri Supreme Court (1) deny petitioner its "right to be treated as if it were an owner" of the leased truck within the meaning of the Motor Carrier Act, and (2) violate Article I, Section 1 of the United States Constitution by "contradicting" the language of the Motor Carrier Act on which the regulations are based.

Neither of petitioner's arguments states a valid jurisdictional base. The jurisdictional statute, 28 U.S.C. Section 1257(3), provides for jurisdiction to review the judgment of a state court when the constitutional validity of a federal statute or treaty has been drawn into question, or when a federally guaranteed right has been asserted or claimed. These "federal" questions serve as a basis for jurisdiction *only* if they have been fairly presented to and passed on by the state court. Where the federal question is not raised in the lower state courts, is not made an assignment of error in the state court of highest resort, and is not passed on by the state court of highest resort, then the United States Supreme Court is without jurisdiction to issue a writ of certiorari. *Ellis v. Dixon,* 349 U.S. 458 (1955) *Congress of Industrial Organizations v. McAdory,* 325 U.S. 472 (1945).

In this case, P.I.E. raised the constitutional issue for the first time in its Motion of Rehearing in the Missouri Supreme Court. Similarly, P.I.E.'s asserted "right" under the Motor Carrier Act was raised late in the appellate process. Neither of these federal questions was ruled by the Missouri Supreme Court.[1]

---

[1] The facts surrounding the presentation and determination of these federal questions will be more fully developed in the Statement of the Case and in Point I of the Argument, infra.

Since no federal question was timely raised in the state courts, and since none was ruled by the Missouri Supreme Court, there is no jurisdictional basis for the issuance of a Writ of Certiorari.

—————o—————

STATEMENT OF THE CASE

P.I.E's statement of the case is, for the most part, adequate to present an overall view of the facts. That statement is somewhat lacking in three respects. First, it is incomplete with respect to describing P.I.E.'s leasing business and the dealings between P.I.E. and truck drivers Brown and Singleton. Second, P.I.E.'s statement tends to emphasize evidence which was rejected by the jury in reaching its verdict and to misconstrue some statements in the opinions of the lower courts which have decided the case. Finally, petitioner's statement is misleading in the manner in which it describes the presentation and determination of the federal question. Accordingly, respondents offer the following limited Statement of the Case, which addresses these three subjects.

P.I.E.'s Business Activities and Its Dealings With Brown and Singleton

Pacific Intermountain Express Co. is an authorized Interstate Commerce Commission motor carrier. One of its operating divisions, All States Trucking, leases tractor-trailer trucks from owners and operators and supplies the I.C.C. authority for those operators to haul regulated freight in interstate commerce. Whenever P.I.E. leases a rig from an owner or operator, a written contract is completed by the P.I.E. field agent, and the field agent gives the operator a sign or placard to be displayed on the truck, identifying P.I.E. as the carrier. The operators are sup-

posed to return the placard after each trip is completed, and if they lease to P.I.E. again, they will be issued a new placard.

When each trip is completed, the P.I.E. field agent is required to collect and send the package of trip documents, including the returned placards, to P.I.E.'s home office. If these documents are not returned to the home office at the proper time, the field agent can be fined. There is, however, no known sanction to be imposed upon the lessor-driver if *he* fails to return the placard to the field agent. Lessor-drivers had, at least on some occasions before this accident, failed to return the placards and still obtained payment for the trip, without penalty or criticism. If, for any reason, the field agent fails to send in his package of documents, P.I.E.'s home office would have no record of a lease having ever been entered.

The identifying placard of a major carrier is very valuable to the independent trucker. It gives him the apparent authority to operate in interstate commerce, and it permits him to travel without inquiry by law enforcement officers. P.I.E.'s system of controls over its placards is intended to prevent any use of the placards without P.I.E.'s knowledge and consent. The only ways to obtain these placards were (1) through a valid lease to P.I.E. or (2) without P.I.E.'s permission and consent, by stealing the signs from other operators or trading for them on the so-called "black market."

In 1978, Roland Tabor, of St. Louis, Missouri was an independent owner-operator of trucks. He leased the 1978 Kenworth truck involved here for a period of five years and began using it in a cross-country operation. He hired Lee Brown, Jr. and Bill Singleton to help drive this truck.

Tabor and the other drivers of his trucks often dealt with Pacific Intermountain Express Co. Tabor's contact

was primarily through a field agent named Kelly located in East St. Louis, Illinois. Tabor had been to Kelly's office, which was identified with a P.I.E. sign. He had been paid by Kelly with P.I.E. checks. Tabor also knew that the other drivers of his trucks dealt with P.I.E. in other areas of the country. He knew that Brown and Singleton had, on more than one occasion, dealt with a P.I.E. agent somewhere in New Jersey or New York. In fact, he had received checks for their work from a P.I.E. representative in New Jersey. Tabor also saw P.I.E.'s signs or placards upon the truck that Brown and Singleton were driving on several occasions when they would come through St. Louis during a cross-country trip.

Bill Singleton identified the P.I.E. representative with whom he and Brown dealt in New Jersey as Ray Dean. Dean had introduced himself as a P.I.E. agent the first time Singleton talked to him by telephone. Singleton described Dean's appearance and testified that they visited Ray Dean at an office marked with P.I.E. signs. He was the only P.I.E. representative with whom Brown and Singleton dealt on the east coast.

While Brown and Singleton were at the P.I.E. office, Dean "cut a lease" and gave a copy of the drivers. He also gave the drivers an advance for their expenses and a sign identifying P.I.E. that was to be placed upon the truck. During the first meeting, Dean told Singleton that, after the load was delivered on the west coast, he could get the remainder of his payment by mailing the sign and trip documents in to P.I.E.'s home office, or by keeping that material until he got back to the east coast and delivering it back to Dean.

That first trip for P.I.E. went off without incident. Singleton elected to personally return the P.I.E. trip docu-

ments and sign to Dean at the conclusion of the round trip. Singleton could not recall whether he removed the P.I.E. sign as soon as they delivered the P.I.E. freight on the west coast, or whether it remained on his truck until he arrived back in New Jersey. In any event, he was not criticized in any way when he returned the sign and the trip documents to P.I.E.'s New Jersey office and obtained his final payment.

The second time that Brown and Singleton hauled a load for P.I.E., they followed the same procedure. They dealt with Ray Dean at the P.I.E. office; they obtained a trip lease, P.I.E. sign, and advance money. Again, Singleton intended to return the trip documents, including the sign, when he was next on the east coast, but this time Singleton was sure that he did *not* remove the sign before the return (eastbound) trip. In fact, he ***never did*** remove that P.I.E. sign from the truck. He personally returned the trip documents to Ray Dean when he was next in New Jersey, but Dean did *not* ask for the sign back, and Singleton did not give it back. He obtained final payment for that second P.I.E. trip, even though he did not return the P.I.E. placard.

After that second load, Brown and Singleton hauled for P.I.E. on at least one or two more occasions before the November collision. Each time they visited the P.I.E. office, they dealt with Ray Dean. On each occasion, Singleton said, they may have been given a new placard, but they never used it because they were still operating with the P.I.E. sign affixed to their truck from their second P.I.E. trip. They developed a friendly working relationship with Dean, and Dean seemed to have confidence in Singleton's operation. Clearly, Singleton believed the series of transactions with P.I.E. would continue.

During these latter P.I.E. trips, Brown and Singleton were never criticized for failing to remove their P.I.E. sign and were never told that they had to take the sign off their truck after each trip. P.I.E. continued to do business on these terms without any criticism of the way Brown and Singleton used the placard. The last of their P.I.E. trips was only 10 to 12 days before the accident. The sign that was affixed to their truck on the second trip remained on the truck until the time of this collision. Singleton identified that sign as the one shown in Plaintiffs' Exhibit 8, the photograph taken after the accident.

Jury Determination and Lower Court Decisions

P.I.E. tried this case on the theory that it had *never* leased this truck from Brown or Singleton and that it could not be responsible merely because its sign somehow found its way onto the side of their truck. P.I.E. introduced the testimony of their employee, Jeff Sills, who described P.I.E.'s record keeping system in detail and testified that he had exhaustively searched those records. His conclusion was that P.I.E. had never leased the 1978 Kenworth driven by Brown at the time of this accident. From that conclusion, P.I.E.'s counsel argued to the jury that the sign which was on the truck at the time of the accident must have been stolen by Brown or Singleton or otherwise obtained through "black market" connections.

These factual issues were submitted to the jury by Instruction No. 7. In order to find in favor of plaintiffs, the jury was required to believe:

> Second, Pacific Intermountain Express Company leased the truck driven by Lee Brown, Jr. and provided a sign to be displayed on the truck identifying Pacific Intermountain Express Company as the carrier, and

> Third, Pacific Intermountain Express Company failed to remove the sign from the truck before the collision of November 19, 1978, . . .

The verdict in favor of plaintiffs-respondents clearly shows that the jury rejected P.I.E.'s trial theory. The jury *did* believe that P.I.E. leased this truck from Brown and Singleton and provided the sign to be displayed on it. The jury *did* believe P.I.E. failed to remove its sign before the collision occurred. The trial court overruled P.I.E.'s post-trial motions and entered judgment in accordance with the jury's verdict.

In the Missouri Court of Appeals, Southern District, P.I.E.'s argument centered around the fact that jury instruction no. 7 did not require a finding that Brown and Singleton were using the truck within the scope and course of their employment for P.I.E. at the time of the collision. This argument was based almost exclusively on the Missouri decision of *Brannaker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524 (Mo. 1968). P.I.E. argued that *Brannaker* had previously considered these same I.C.C. regulations and had held that, under Missouri law, the carrier was liable only if there was an evidentiary showing that the driver was acting within the scope and course of the carrier's business. The Court of Appeals, however, adopted the interpretation of the federal regulations suggested by plaintiff and held that, under the regulations, plaintiff could make a submissible case without a showing of "scope and course of employment," as that phrase is used at common law. After its Motion for Rehearing was denied by the Court of Appeals, P.I.E. sought transfer to the Supreme Court of Missouri.

Under Missouri practice, the state supreme court considered the case as if on original appeal. P.I.E. again argued that *Brannaker* required the submission of the

"scope and course of employment" issue and also added the claim that the language of the Motor Carrier Act required that it be treated "like an owner" of the leased truck. Respondents, on the other hand, again suggested that the regulations specifically required the removal of the identifying placard before the lease would be considered terminated, and therefore, P.I.E. was still in "exclusive possession, control and use of the equipment" within the meaning of the regulation.

The Missouri Supreme Court did not decide the issue of whether the lease was still in effect at the time of this collision. Instead, the court analyzed P.I.E.'s responsibility by studying the purposes and policies underlying the federal regulations and held that, regardless of the technical effect of the regulations and the continuing force of the lease, P.I.E. would be liable under an "apparent authority" theory if they provided this sign to the drivers and failed to remove it before the time of the collision.

Presentation of the Federal Question

Petitioner's asserted right to be treated "like an owner" of a leased truck and petitioner's claim that the regulation somehow contradicts the provisions of the Motor Carrier Act (and therefore violates Article I, Section 1 of the United States Constitution) came late in the proceedings. Throughout the course of the trial and in the argument and submission of post-trial motions to the trial court, P.I.E. argued only state law issues, including respondents' failure to submit "scope and course of employment" as required by traditional Missouri respondeat superior cases. Similarly, in the Missouri Court of Appeals, Southern District, P.I.E. argued the scope and course of employment issue and emphasized the fact that it did not participate in or even have knowledge of the trip in ques-

tion. It was in P.I.E.'s reply brief in the Missouri Court of Appeals that petitioner first cited the Motor Carrier Act language (49 U.S.C. § 11107(a)) and argued that it should be treated "like an owner" of the truck. This argument, coming for the first time in the reply brief, was ignored by the Court of Appeals.

After transfer to the Missouri Supreme Court, P.I.E. did raise and argue its interpretation of the Motor Carrier Act and contended that it should be entitled to be treated "like an owner" (which, according to P.I.E., meant there should be a showing of scope and course of employment before liability was established). Still, petitioner did not suggest that the purported contradiction between the language of the Motor Carrier Act and the language of the I.C.C. regulation created any constitutional question. After the Supreme Court of Missouri rendered its opinion, P.I.E. filed its Motion for Rehearing. There, P.I.E. argued for the *first* time that the alleged contradiction between the federal regulation and the enabling statute raised a constitutional question about the validity of the regulation. That constitutional question was neither addressed nor decided by the Missouri Supreme Court.

SUMMARY OF ARGUMENT

The Missouri Supreme Court's decision in this case was based on an expanded application of the common-law rule of "apparent authority." The court expressly declined to decide whether there was an I.C.C. lease in effect at the time of this accident. Though the court did fully discuss the policy reasons underlying the federal regulatory scheme, and though the court applied those same policy reasons to reach its decision here, no interpretation or application of the I.C.C. regulations was attempted.

Moreover, the court did not consider or decide the constitutional question raised by P.I.E. late in the state appellate process. For these reasons, it is clear that no federal question has been decided so as to provide a jurisdictional base for review by the United States Supreme Court.

Assuming, for sake of argument, that the Missouri Supreme Court opinion does constitute the interpretation and application of federal regulations, this Court should exercise its discretionary power to decline review of this case. The jury in this case determined that P.I.E. had leased this truck and had failed to remove its identifying placard. It was concluded that this truck was being used in Interstate Commerce at the time of the accident. Under these factual circumstances, a conclusion that the lessee-carrier is liable is in the mainstream of those cases interpreting and applying the I.C.C. regulations. While there is some conflict in the decisions applying I.C.C. regulations where the accident occurs during a movement *not* related to interstate commerce, that factual issue is not present here. There is no reason to require the United States Supreme Court to review this particular application of the I.C.C. regulations.

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ARGUMENT: REASONS FOR DENYING THE WRIT

I.

There Has Been No Federal Question Presented and Decided so as to Provide a Jurisdictional Basis for Review by This Court; This Is True Because:

A. The constitutional question asserted here by petitioner was first raised in petitioner's motion for rehearing in the Supreme Court of Missouri; it was never presented to the lower state courts and was not considered or decided by the Missouri Supreme Court.

It is clear that the United States Supreme Court is without jurisdiction to issue a writ of certiorari to a state

court unless a federal question has been timely raised and properly presented in the state court proceeding. *See, e.g., Ellis v. Dixon,* 349 U.S. 458 (1955); *Congress of Industrial Organizations v. McAdory,* 325 U.S. 472 (1945). If the higher state courts fail or refuse to hear the federal question because it was not timely raised in the courts below, then the United States Supreme Court will not review the question and will not issue certiorari. *Williams v. Georgia,* 349 U.S. 375 (1955); *Hartford Life Insurance Co. v. Johnson,* 249 U.S. 490 (1919); *Erie Railroad Co. v. Purdy,* 185 U.S. 148 (1902).

P.I.E. contends that the I.C.C. regulations as interpreted by the Missouri courts are somehow in conflict with the provisions of the Motor Carrier Act, and, therefore, that the regulations violate Article I, Section 1 of the United States Constitution. That claim was not timely raised in the Missouri state courts. It was never mentioned, and the United States Constitution was never cited, in either the trial court or the Missouri Court of Appeals. Moreover, that claim was not raised in P.I.E.'s appellant's brief, reply brief, or oral argument before the Missouri Supreme Court. At page 17 of its Petition for Writ of Certiorari, P.I.E. admits that the first time the constitutional claim was made was in its motion fo rehearing in the Supreme Court of Missouri. At that late stage, of course, the argument was nothing more than an afterthought. The Missouri Supreme Court did not even take note of it, much less decide the question one way or the other.

Since the claim of constitutional invalidity was not presented in the lower state courts and was not considered or determined by the Missouri Supreme Court, it should not now be the basis for review by this Court.

B. Petitioner's claimed right "to be treated like an owner" under the provisions of the Motor Carrier Act was never mentioned in the trial court, was asserted in the Missouri Court of Appeals only in petitioner's reply brief, and was not considered as a determinative factor by the Missouri Court of Appeals or the Missouri Supreme Court.

The second federal question asserted by P.I.E. as a basis for review in this Court suffers from the same infirmity. P.I.E. claims a right guaranteed by 49 U.S.C. Section 11107(a) to be treated "as if it were the owner" of the leased truck. Even if one were to assume that the phrase in the statute was sufficient to rise to the level of a federally protected "right," P.I.E. failed to make a timely assertion of that right.

P.I.E.'s trial theory was that it had never had any contact with the drivers of this truck and, therefore, could not be held vicariously liable. P.I.E. never argued to the jury that the Motor Carrier Act required that it be treated "like an owner." P.I.E. never suggested an instruction be given to the jury based on that federal statute. P.I.E. never argued to the trial court in post-trial proceedings that its obligation under the Motor Carrier Act was like that or limited to that of an owner. In fact, after the trial court ruled the post-trial motions, P.I.E. filed its appeal in the Missouri Court of Appeals and thoroughly briefed the issues without ever citing the Motor Carrier Act or asserting any right or privilege under it. The contention now made was first raised by P.I.E. in its reply brief in the Missouri Court of Appeals. Though the Court of Appeals' opinion extensively discussed P.I.E.'s liability, it did not consider the belated assertion that a federally protected right existed because of the language of the Motor Carrier Act. The same was true after the case was transferred to

the Missouri Supreme Court. The Supreme Court decided the case as it would any question of common-law agency. The policies and purposes underlying the federal regulatory scheme were given due consideration, but the asserted right of a carrier under the Motor Carrier Act was never even mentioned by the Court.

Since petitioner's claimed right under the Motor Carrier Act to be treated "like an owner" was not timely asserted in the lower state courts, and since it was not considered and ruled by any of the state courts, it should not be the basis for review by the United States Supreme Court.

C. The decision of the Missouri Supreme Court, though influenced by the policy reasons underlying the federal regulatory scheme, was clearly based on the common-law rule of "apparent authority"; the Missouri Supreme Court expressly refused to interpret the federal regulation and decide whether a lease still existed at the time of the accident; therefore, there was no "federal question" decided here.

The only federal question that was timely raised and presented throughout the course of the proceedings in the Missouri state courts was the interpretation of federal regulations. As framed by plaintiffs-respondents to the trial court, that question was whether the I.C.C. regulations require that the lessee-carrier be responsible for leased equipment until it removes its sign, even though that equipment is not being used to directly serve the carrier's interest at the time of the accident. Plaintiffs argued from the beginning that the regulations had that force and effect. Defendant-petitioner, of course, argued otherwise. This issue, however, cannot be the jurisdictional basis for review here because the Missouri Supreme Court did not decide this question. Instead, the Missouri

Supreme Court expressly avoided any interpretation of the I.C.C. regulations and found P.I.E. responsible on an expanded common-law "apparent agency" theory based upon the same public policy that led to the adoption of the federal regulation.

The fact that the Missouri Supreme Court did not interpret the federal regulation and determine whether a lease was still in effect is abundently clear from the language of the opinion itself. Judge Blackmar, writing for the majority of the court, first recognized that federal regulations do impact tort liability theories, but it was clear to Judge Blackmar that the federal regulations did not mandate a particular holding:

> The federal statute and regulations have been held, in numerous cases from different jurisdictions, to have a definite and substantial impact on tort liability. These holdings are not mandated by any controlling authority from the Supreme Court of the United States, but rather represent *the consensus of judicial authority based on analysis of statutory policy* and implementing regulations. (662 S.W.2d at 243; P.I.E.'s Appendix A at A-10) (Emphasis Supplied)

The court expressly stated that its decision was based upon a theory of apparent authority, without regard to the continuing force and effect of the lease under the I.C.C. regulations:

> By allowing the trucker to retain the signs, [*P.I.E.*] *contributed to the appearance that the unit was operating under P.I.E.'s authority.* . . . [I]t is quite possible that a truck with unauthorized signs might be able to attract freight business which would not otherwise fall to it.
>
> We conclude that P.I.E. may be held liable for the truck driver's negligence, *without regard to the continuing force of the lease,* if the jury finds: (1) that a sign or identifying legend was furnished by the car-

> rier in connection with a lease; (2) that the sign was on the truck at the time of the accident; and (3) that the truck was hauling regulated freight at the time of the accident.[19]
>
> The conclusion we reach is based on statutory *policy* rather than a conventional respondent superior theory. . . . *Our holding centers on the appearance of authority created and maintained when a sign is issued and not retrieved.* (662 S.W.2d at 245-246; P.I.E.'s Appendix A-14 through A-16) (Emphasis Supplied)

The court's footnote 19, which is referenced in the above quoted segment of the opinion, is also illustrative of the fact that the Court was not interpreting or applying the federal regulations so as as to decide whether there was a lease still in effect:

> [W]e [do not] have to deal with a situation such as was present in *Brannaker* or in *Rodriguez v. Ager, supra,* in which there was evidence of a lease still in effect. (662 S.W. 2d at 245, n. 19; P.I.E.'s Appendix A at A-15)

Undoubtedly, the federal regulatory scheme was important to the reasoning of the Missouri Supreme Court. The policies which justify the enactment of a regulation requiring the removal of a sign, are the same policies which justify the adoption of the "apparent authority" rule of law exhibited here. Nevertheless, the court's opinion is without question based upon an expanded version of the common law of agency. The court expressly declined to decide whether or not there was or was not a lease in effect within the meaning of the federal regulations. Accordingly, there was no federal question decided by the Supreme Court of Missouri, and there can be no basis for review in the United States Supreme Court.

II.

Even if the Decision of the Missouri Supreme Court Is Considered an "Interpretation" of the Federal Regulation (and, Therefore, the Determination of a Federal Question), Review by This Court Should Be Denied Because:

A. The Court's interpretation of the federal regulations was clearly correct and is in accord with the leading authorities.

Every indication in the opinion of the Missouri Supreme Court is that its decision was made as a matter of common-law agency based on sound public policy. If that is true, then no jurisdiction exists to issue a writ of certiorari. However, if one *assumes* that the Missouri Supreme Court has interpreted the federal regulations and decided a federal question, this Court should still exercise its discretion to deny the writ of certiorari; the Missouri court's interpretation of the regulations was clearly correct and in accord with the leading authorities.

These regulatic , codified at 49 C.F.R. section 1057.4, provide that an authorized carrier may lease non-owned equipment so long as the lease provide for "exclusive possession, control, and use of the equipment" for the duration of the lease. Such leases must specify their duration, which in most circumstances may not be less than 30 days. Regardless of the minimum duration stated in the lease, the carrier's obligation under the lease will exist until the carrier (1) obtains a signed receipt from the lessor for return of the equipment, and (2) removes its identifying signs and placards. The pertinent portions of the regulations follow:

> **(a) Contract requirements.** The contract, lease, or other arrangement for the use of such equipment:
>
> . . . .

(4) Exclusive possession and responsibilities. Shall provide for *the exclusive possession, control, and use of the equipment*, and for *the complete assumption of responsibility in respect thereto*, by the lessee *for the duration of said contract*, lease or other arrangement, ...

. . . .

(6) Duration to be specific. . . . *The duration of the contract, lease or other arrangement shall coincide with the time for the giving of receipts for the equipment as required by paragraph (b) of this section*, ...

. . . .

(b) Receipts for equipment to be specific. . . . *when the possession by the authorized carrier ends; it or its employee or agent shall obtain from the owner of the equipment, or its regular employee or agent duly authorized to act for it, a receipt specifically identifing the equipment and stating therein the date and the time of day possession thereof it taken.*

. . . .

(d) Identification of equipment as that of the authorized carrier. *The authorized carrier* acquiring the use of equipment under this rule *shall properly and correctly identify such equipment during the period of the lease*, ...

(1) Identification to be removed when lease terminated. *The authorized carrier* operating equipment under this part *shall remove any legend, showing it as the operating carrier*, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, *before relinquishing possession of the equipment.* (49 C.F.R. § 1057.4; P.I.E.'s Appendix I) (Emphasis Supplied)

The burden of obtaining these lease agreements and properly terminating the agreements is placed squarely on *the authorized carrier*. It is *the carrier*, rather than the lessor-driver, who is required to comply with the regula-

tions — including (1) obtaining receipts for the equipment and (2) removal of its identifying legends before relinquishing possession of the equipment. This burden is certainly justified when the policies underlying the enactment of these I.C.C. regulations are considered.

The Policy Underlying the Regulatory Scheme

These regulations were first upheld against constitutional challenges in *American Trucking Ass'ns. v. United States*, 345 U.S. 913 (1953). This Court thoroughly discussed the conditions of the trucking industry and the abuses which it saw there. It concluded that the imposition of a strict regulatory scheme on the authorized carriers was justified in order to avoid those abuses and achieve the needed goals.

One of the problems which the Supreme Court recognized in *American Trucking Ass'ns.*, and which the regulations were designed to remedy, was the provision of a financially responsible party to stand behind any interstate trucking operation which negligently injures members of the traveling public. *See also, Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28 (1975); *Rodriguez v. Ager*, 705 F.2d 1229 (10th Cir. 1983); *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972). These cases suggest that, in every case where a truck driver negligently injures a member of the public, *there should be a remedy!*[2] If the truck is being operated in interstate

[2] P.I.E. has criticized plaintiffs throughout this appeal for making this statement, and suggests plaintiffs are merely looking for a "deep pocket." Plaintiffs stand by this statement! The public policy discussed in these cases is *fair compensation to innocent victims* of the abuses in the trucking industry. The concept of fair compensation includes not only a legal remedy, but also the financial ability to make payment pursuant to that legal remedy.

commerce, subject to the control of the I.C.C., the authorized carrier must bear the burden of providing that remedy, thus allocating the risk throughout the industry.

The courts also recognize that the use of a sign identifying a responsible, certified carrier often permits an irresponsible, independent operator to travel in interstate commerce without being detected by the authorities. As stated in *Leotta v. Plessinger*, 8 N.Y. 2d 449, 209 N.Y.S. 2d 304, 171 N.E.2d 454 (1960):

> [P]rospective shippers were more likely to give business to one who operated under an established common carrier name and certificate than to an individual trucker operating under his own name without I.C.C. certification and without any evidence of financial responsibility. Furthermore, public officials checking the vehicle en route would be influenced by the presence of the I.C.C. placard as indicating that proper inspections of the vehicle had been made and that the operation was being conducted by a responsible certified carrier. 171 N.E.2d at 458

Accordingly, the regulations make the carrier's responsibility correspond to the appearance of its placard on the leased equipment. The removal of the carrier's signs is a prerequisite to "relinquishing possession" (§ 1057.4(d)(1)) and, therefore, must be accomplished before the lease is terminated (§ 1057.4(a)(6) and § 1057.4(b). The I.C.C. carrier is held to have "exclusive possession and control" of any truck which it has leased until such time as the lease is properly terminated by removing the identifying signs.

Similarly, the courts recognize that there are literally thousands of independent owner-operators, and relatively few authorized carriers. Proper control of the industry can be effected *only* if the obligation to comply with the

regulations is cast upon the authorized carriers. This principle has been stated by one court as follows:

> [T]he ICC carriers are the only effective institutions capable of insuring that non leased equipment is kept off the highways, and as possessors of a profitable public franchise, these carriers must assume the responsibility for policing this area. *Cosmopolitan Mutual Insurance Company v. White*, 336 F.Supp. 92, 97 (D.Del. 1972)

It is for these reasons that the regulations impose on *the carrier*, rather than the driver, the obligation to accomplish each of the steps necessary to termination of the lease:

> *The authorized carrier* . . . shall remove any legend . . . before relinquishing possession of the equipment. § 1057.4(d)(1)
>
> [W]hen the possession by the authorized carrier ends; *it or its employee or agent* shall obtain . . . a receipt specifically identifying the equipment. . . . § 1057.4(b)

The regulatory scheme certainly does not amount to an unfair burden on the I.C.C. carriers. In fact, it is an economic advantage for them. They are permitted to lease trucks to carry their goods but are not required to *purchase* all the expensive equipment they use. In exchange for this economic benefit, the carrier must keep up with its leases and accept the financial responsibility for the trucks which they have authorized to be on the road. It is the carrier who must police it's own industry!

Further, the burden of policing this industry is certainly *not* an impossible one. The carrier has the power of the purse! P.I.E. could have refused to pay Brown and Singleton for their services until the receipts were signed and the placards were returned. In fact, Singleton testified that they continued to do business with P.I.E., without criticism, after they had completed the trip for which the

lease was entered and had failed to return the placards. The burden imposed on the carrier is not an impossible one if the carrier is interested in complying with the regulations, but the evidence here shows that P.I.E., or at least some of its agents, were just not interested.

Moreover, it was P.I.E.'s leasing of this particular truck that permitted Brown and Singleton to operate in interstate commerce. The P.I.E. placard was attached to the truck and visible when Brown and Singleton pulled in to Marlo's office to do the paperwork on this load. Marlo's president testified that, though he had no specific memory of this inspection, the policy of his firm would be to inspect the equipment being used on this kind of trip, and such an inspection might well include a check of the driver's I.C.C. authority and placards. Singleton was not concerned about being stopped by the authorities because they had a P.I.E. sign on the truck, and that would permit them to travel without incident so long as they could avoid highway weigh stations. It was obvious from Plaintiffs' Exhibit No. 8, a photograph of the P.I.E. sign on the side of the truck, that the placard was not a handwritten sign but was a standardized, mass-produced form that would be used on all of P.I.E.'s hundreds and hundreds of trucks. Any law enforcement officer knowledgeable about the trucking industry would recognize it as the standard sign of a major, legitimate interstate carrier.

Finally, it should be remembered that the very nature of this activity justifies the imposition of a tough legal responsibility. The vehicles involved here are not 2500 pound automobiles, but tractor trailer trucks which weigh up to 80,000 pounds. Unlike privately owned automobiles, these trucks average over a hundred thousand miles a year on major highways. The potential for death and destruc-

tion from such an operation is great! The need for controlling such an operation is also great.

Cases Applying the I.C.C. Regulations: Termination of the Carrier's Responsibility

The cases which have interpreted and applied these I.C.C. regulations have consistently held that the carrier's obligations to obtain a signed receipt and remove its identification are *prerequisites* to the termination of its responsibility under an I.C.C. lease. *Mellon National Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473 (3d Cir. 1961) is a leading case. It held that Turner Transfer, Inc., an I.C.C. carrier, was liable as a matter of law for any negligence the jury might attribute to the lessor driver. The first step in the court's rationale was to determine whether the lease had been terminated at the time of the accident:

> Turner could have effectually eliminated its responsibility for the truck's use in only one way i.e. (1) removing " • • • any legend showing it as the operating carrier, displayed on such equipment • • • and (2) obtaining the receipt called for by [the regulations]. . . ." It failed to do this. 289 F.2d at 476-477

Also in point are *Kreider Truck Service, Inc. v. Augustine*, 76 Ill.2d 535, 394 N.E.2d 1179, 1182 (1979) ("[T]he provisions of the ICC regulations place upon the lessee exclusive possession and complete responsibility, which remain until possession is surrendered and the identification legend of the lessee-carrier is removed."); *Cosmopolitan Mutual Insurance Company v. White*, 336 F. Supp. 92, 96 (D. Del. 1972) ("Obtaining a receipt for the return of the vehicle and removing the ICC placards are prerequisites to termination of an ICC lease."); *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579, 588-589 (1969) ("Bond could eliminate this presumption [of

liability] only by conforming with the regulations, i.e., (1) removing '• • • any legend, showing it as the operating carrier, . . .' and (2) obtaining the receipt called for by Section 1057.4. . . ."); and *Bankers & Shippers Insurance Co. of New York v. Watson*, 216 Va. 807, 224 S.E.2d 312, 314-15 (1976) ("[T]he lease agreement . . . required for its termination the removal of interstate permit numbers and the giving of a receipt. . . . The failure to comply with these regulations, as a matter of law, prevents cancellation of the lease and an avoidance of liability on the part of the lessee. . . ."). *See also, Rodriguez v. Ager*, 705 F.2d 1229 (10th Cir. 1983); *Wellman v. Liberty Mutual Insurance Company*, 496 F.2d 131 (8th Cir. 1974); *Schedler v. Rowley Interstate Transportation Co., Inc.*, 68 Ill.2d 7, 368 N.E.2d 1287 (1977); *Brannaker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524 (Mo. 1968).

The regulations clearly set out the requirements for the termination of an I.C.C. lease. All of the cases cited above recognize those requirements and agree that a lease is not terminated and the carrier's liability under it is not discharged until the identifying placard is removed from the leased vehicle. Accordingly, the Missouri Supreme Court's decision, if it involves a federal question at all, falls within the mainstream of a well-established line of judicial thought applying these regulations to establish civil tort liability.

B. The interpretation of the regulations urged by petitioner would undermine the entire purpose and effect of the regulatory scheme.

The Motor Carrier Act and the regulations promulgated pursuant to it were designed to remedy the abuses which were evident in the trucking industry. The "independent contractor" defenses were eliminated, and the

scope of the carrier's responsibility for leased trucks was expanded. Additionally, the burden was placed squarely upon the carrier to police its own industry.

P.I.E. urged the courts below, and now asks this Court, to adopt an interpretation of these regulations which holds the carrier liable *only* if these is a factual determination that the driver was serving the carrier's business interests at the time of the accident. Such an interpretation would return the state of the law to traditional respondent superior principles. The regulations of the Interstate Commerce Commission would have *no effect at all* in determining the scope of the liability of an authorized lessee-carrier.

Principles of statutory construction and simple logic dictate that the regulations of a federal commission should not be interpreted so as to make them totally ineffective. The interpretation urged by P.I.E. would have precisely that effect. It was not adopted by the lower courts, and it should not now be considered by this Court.

C. Contrary to petitioner's suggestion, there is no conflict between the decisions of other jurisdictions interpreting these regulations so as to require review and clarification by the United States Supreme Court

P.I.E. claims that there is a conflict in the decisions of the courts of various jurisdictions that requires Supreme Court reconciliation. Respondents concede that there is a split in the decisions on one issue involved in interpreting these regulations, but that issue is not raised by the facts of this case. P.I.E. would have this Court review the case for purposes of deciding an issue not required for final determination of this cause.

P.I.E. asserts that "one distinct line" of cases interpreting the regulations holds that the lessee-carrier is not liable where the driver has completed his work for the

carrier and the driver is on a mission of his own. P.I.E. cites five cases which, it says, stand for that proposition. A review of each of those cases, however, shows that they provide no support to P.I.E. here. Each of those cases involved a situation where the driver was using the subject truck for personal transportation, unrelated to interstate commerce and unrelated to any activity which the Interstate Commerce Commission has authority to regulate.[3]

Quotations from two of the cases cited by P.I.E. clearly illustrate that the conclusion of those courts would have been different had the truck driver been involved in an interstate movement at the time of the accident. *Schmidbauer v. Baltimore & Pittsburgh Motor Express Company*, 228 Md. 637, 181 A.2d 325 (1962) held that a carrier was not liable for a driver's use of a tractor-trailer truck while the driver was on his way to a movie theater for personal entertainment. The Court specifically pointed out that this particular transportation was entirely disassociated with interstate commerce:

> [W]e, therefore, hold that [the federal regulation] does not impose liability on the franchised carrier between interstate movements, *when the nonowned equipment is being utilized in an activity that is entirely disassociated with interstate or foreign commerce*, such as the activity of the tractor involved in the present case, as shown by the undisputed facts. 181 A.2d at 330 (Emphasis Supplied)

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[3] The five cases cited by P.I.E. are: *Wilcox v. Transamerican Freight Lines, Inc.*, 371 F.2d 403 (6th Cir. 1967) (driver using truck for personal transportation to and from his home after work hours); *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579 (1969) (driver using truck for personal transportation on errands near his home); *Gackstetter v. Dart Transit Company*, 269 Minn. 146, 130 N.W.2d 326 (1964) (driver using truck for a personal errand while on his way home); *Kaplan Trucking Company v. Lavine*, 253 F.2d 254 (6th Cir. 1958) (driver using truck for personal transportation to and from home); *Schmidbauer v. Baltimore & Pittsburgh Motor Express Company*, 228 Md. 637, 181 A.2d 325 (1962) (driver using truck for transportation to a movie theater for personal entertainment).

Similarly, in *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579 (1969), the court recognized the importance of this factor. There, the jury found that the driver was, under the common law, serving the carrier's business interests at the time of the collision. The court affirmed the judgment against the carrier and clearly indicated that had the truck been involved in interstate commerce at the time of the collision, the carrier's responsibility would have been established as a matter of law and without resort to jury determination:

> Bond [the carrier] attempts to distinguish [*Mellon National Bank and Trust Company v. Sophie Lines*, 289 F.2d 473 (3d Cir. 1961)] because the Turner tractor was in the course of an interstate trip when the accident happened. The interstate aspect may appear to make the case a stronger one than ours for the imposition of liability on the carrier. . . . At most, *the different circumstance* [*in this case*] *would have resulted in a jury question as to whether under the course of conduct shown, Turner was receiving an incidental benefit from the intrastate journey* within the scope of the regulations. 249 A.2d at 591, 592 (Emphasis Supplied)

A "conflict" among the decisions *does* exist because many cases have gone much farther than those five cases cited by P.I.E. and have held that the carrier who leases the truck and fails to remove its identifying placard is liable regardless of the activity in which the truck was involved at the time of the accident. These cases emphasize the language of the regulations which places "*exclusive* possession and control" of the truck in the lessee-carrier. *Kreider Truck Service, Inc. v. Augustine*, 76 Ill.2d 535, 394 N.E.2d 1179 (1979) is an excellent example of cases which have adopted this position. In the *Kreider* case, the intermediate appellate court had ruled in favor of the lessee-carrier because the truck was being used purely intrastate at the time of the accident. However, the Illinois

Supreme Court reversed the lower court and held the lessee-carrier responsible even though the truck was not being used in interstate commerce. The Court emphasized the policies underlying the enactment of the federal regulations:

> [T]he responsibility of the lessee who vested the owner-lessor with this authority must remain until possession is surrendered in the manner provided in the regulations. . . . To permit a shifting of responsibility from lessee to owner and back to lessee, depending upon in whose business the vehicle is being used, without the execution of the required receipts when possession changes and without removing the carrier's identification number could lead to an abuse of the privilege granted by the permit and undermine the effectiveness of the regulation in accomplishing the purpose for which they were adopted. 394 N.E.2d at 1182

Other cases which strictly apply the exclusive possession and control language and follow the reasoning of the *Kreider* court include the leading federal cases: *Rodriguez v. Ager*, 705 F.2d 1229 (10th Cir. 1983); *Wellman v. Liberty Mutual Insurance Company*, 496 F.2d 131 (8th Cir. 1974); *Mellon National Bank and Trust Company v. Sophie Lines, Inc.*, 289 F.2d 473 (3d Cir. 1961).

Careful consideration of all of the lessee-carrier cases shows that the only "conflict" in the decisions is between (1) those courts which hold the lessee-carrier liable regardless of the use to which the truck is put and (2) those courts which hold the carrier liable only if the truck is being used in interstate commerce. ***No cases have been cited by P.I.E. and no cases have been located by respondents which hold the carrier liable only when the truck is being used to haul goods with the express knowledge and consent of the lessee-carrier!*** The "lines of authority" are illustrated by the following chart:

All Cases Where Carrier Leased Truck but Failed to Remove Its Sign

1. Cases holding carrier liable only on a showing that driver was hauling a load with the knowledge and consent of carrier at time of accident:

   None

2. Cases holding carrier liable only on a showing that driver was hauling in interstate commerce at time of accident:

   Wilcox v. Transamerican Freight Lines, Inc., 371 F.2d 403 (6th Cir. 1967);

   Kaplan Trucking Company v. Lavine, 253 F.2d 254 (6th Cir. 1958);

   Kreider Truck Service, Inc. v. Augustine, 64 Ill. App.3d 576, 381 N.E.2d 791, 1182 (1978); rev'd 76 Ill.2d 535, 394 N.E.2d 1179 (1979);

   Schmidbauer v. Baltimore & Pittsburgh Motor Express Company, 228 Md. 637, 181 A.2d 325 (1962);

   Gackstetter v. Dart Transit Company, 269 Minn. 146, 130 N.W.2d 326 (1964);

   Cox v. Bond Transportation, Inc., 53 N.J. 186, 249 A.2d 579 (1969).

3. Cases holding carrier liable regardless of what driver was doing at time of accident:

   Rodriguez v. Ager, 105 F.2d 1229 (10th Cir. 1983);

   Wellman v. Liberty Mutual Insurance Company, 496 F.2d 131 (8th Cir. 1974);

   Mellon National Bank and Trust Company v. Sophie Lines, 289 F.2d 473 (3d Cir. 1961);

   Simmons v. King, 478 F.2d 857 (5th Cir. 1973);

   Cosmopolitan Mutual Insurance Company v. White, 336 F. Supp. 92 (D. Del. 1972);

   Hodges v. Johnson, 52 F.Supp. 488 (W.D. Va. 1943);

   Home Indemnity Company v. St. Paul Fire & Marine Insurance Company, 585 S.W.2d 419 (Ky. App. 1979);

   ***Kreider Truck Service, Inc. v. Augustine*, 76 Ill.2d 535, 394 N.E.2d 1179 (1979);**

Schedler v. Rowley Interstate Transportation Company, 68 Ill.2d 7, 368 N.E.2d 1287 (1977);
Weeks v. Kelley, 377 A.2d 444 (Me. 1977);
Felbrant v. Able, 194 A.2d 491 (N.J. 1963);
Leotta v. Plessinger, 8 N.Y.2d 449, 209 N.Y.S.2d 304, 171 N.E.2d 454 (1960).

In deciding the instant case, the Missouri Supreme Court clearly recognized the import of those cases in category no. 2. Those cases have logical support — when the truck is being used for an activity not related to interstate commerce, there is no basis for imposing strict regulation of the activity. Accordingly, the Missouri court held that P.I.E.'s liability could be established if the jury found (1) the carrier leased the truck and provided a sign to be displayed on it, (2) the carrier failed to remove that sign before the accident, and *(3) the truck was being used in interstate commerce at the time of the accident.* (662 S.W.2d at 245; P.I.E.'s Appendix A at A-15.)

Actually, the Missouri Supreme Court did not have to decide between the positions represented by categories no. 2 and 3 above. The evidence was uncontradicted in this case that Brown and Singleton *were* hauling regulated freight in interstate commerce at the time of the accident, so P.I.E. would be liable in any event. The court's statement of the rule is most consistent with the language of the cases discussed in category no. 2, but there is no way to know what ruling would have been made had this accident occurred while the truck was not on an interstate movement.

Since the only "conflict in the decision" is between category nos. 2 and 3 above, and since P.I.E. is liable under *either* of those two rules, then there is certainly no basis for review by this Court on the theory that the conflicting decisions need to be reconciled.

D. The rules governing the motor carrier industry and providing protection to the traveling public have been amply served by the promulgation of comprehensive regulations by the Interstate Commerce Commission and by the consistent application of those regulations by various state and federal courts; no further purpose would be served by requiring the Court to apply those regulations in the particular factual circumstances presented here.

P.I.E. suggests that this Court review the case so as to establish an appropriate rule of liability, thereby providing guidance to the trucking industry and protection to the traveling public. Respondents respectfully submit that such a rule of liability has already been defined by the careful and detailed work of the Interstate Commerce Commission in promulgating these regulations. Moreover, as has been herein shown, the courts interpreting these regulations have applied them consistently and uniformly with respect to any facts which are at issue here. Accordingly, there would be no useful purpose served by requiring this Court to review those regulations and apply them to any particular factual situation that might be framed in this particular case. Such a review would be an unnecessary imposition upon the valuable time of the nation's highest court.

CONCLUSION

For all the reasons heretofore stated, respondents respectfully submit that the Petition for Writ of Certiorari to the Supreme Court of Missouri should be denied.

Respectfully submitted,

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